No. 11,545

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

Z. E. EAGLESTON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

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JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of conviction by the District Court of the United States for the Territory of Alaska, Third Division. The offense charged in the indictment is assault with a dangerous weapon, a violation of Section 4778, Compiled Laws of Alaska, and is punishable by imprisonment for a term exceeding one year. This Court has jurisdiction under the provisions of 28 United States Code, Section 225, subdivision (a), First and Third and subdivision (d).

OFFENSE CHARGED, PLEA, VERDICT AND SENTENCE.

Appellant was charged in an indictment returned by the Grand Jury for the Territory of Alaska, Third

Division, with the crime of assault with a dangerous weapon upon one Frank Rowley in violation of Section 4778, Compiled Laws of Alaska. (T. R. 2.) He entered a plea of not guilty. After a trial by jury, he was found guilty as charged in the indictment. (T. R. 24.) Motions for a new trial (T. R. 24) and in arrest of judgment (T. R. 31) were denied (T. R. 36); appellant was thereupon sentenced to prison for a period of three years. (T. R. 38.) Notice of appeal was filed. (T. R. 39.)

STATEMENT OF FACTS.

The incident out of which the indictment arose occurred in Anchorage, Alaska, about 8:45 A. M. on July 30, 1946. (T. R. 48.) Appellant, at that time, was the owner of a salvage yard where second-hand equipment was sold. (T. R. 189.) The complaining witness, Frank Rowley, was an electrical worker and at this time was engaged in installing an electrical system in Mt. View, Alaska. (T. R. 171.)

Shortly before July 30, 1946, appellant visited Rowley at Mt. View, Alaska, and had a discussion with him about the purchase of a couple of war surplus generating plants. During this talk it developed that appellant owned an oil tank in which Rowley expressed an interest (T. R. 171, 172) and there was some discussion about the price of the oil tank.

On July 30, 1946, at about 7:30 A. M., Rowley, together with one Ken Hinchey, went to appellant's salvage yard in Anchorage, Alaska, for the purpose

of purchasing and taking away the oil tank. Appellant was not there at the time. (T. R. 173.) George Miles, an employee of appellant, arrived at the yard shortly thereafter. (T. R. 173.) Rowley told Miles that he wished to buy the tank for $150. (T. R. 248.) Miles replied that he thought this was a low price and asked Rowley whether he had talked to appellant about it. Rowley said he had not. Miles then suggested that Rowley see appellant about the price. (T. R. 248.) Rowley and Miles got into Rowley's pick-up truck and began to hunt for appellant. (T. R. 248.) They first went to appellant's house. He was not there. They went to the Alta Club (T. R. 190) and then circled back to appellant's house and entered the back yard from the alley in the rear of the house. (T. R. 190.) Dave Foote, appellant's truck driver and handyman, was in the back yard at the time. (T. R. 190, 248.)

Rowley and Miles entered the house through the rear door, crossed a hallway and knocked at a door leading to appellant's bedroom. (T. R. 181, 248.) Appellant came to the bedroom door and said, "What the hell is your hurry, can't you wait a few minutes?" (T. R. 248, 415.) Miles told appellant that Rowley was ready to take the oil tank from his junk yard, and that Rowley insisted that the purchase price was $150. (T. R. 191, 415.) Appellant maintained that the price of the tank was $250. (T. R. 191, 249, 416.) After some argument between them over the price, and after Miles left the house and went into the yard (T. R. 191, 249), appellant finally told Rowley that

the price was either $250 or nothing, and said: "Now, don't call me a liar in my own house". (T. R. 416, 192, 96.) Rowley stepped outside the rear door and replied: "You are a liar". (T. R. 416, 90, 96.) Appellant at that time was standing in the doorway of his house. (T. R. 90, 175.)

Miles testified that when he was five or six feet outside the door, he heard appellant tell Rowley that the latter could not argue with him in his own house. This was immediately after Miles had left the house. (T. R. 249.) Miles also heard appellant tell Rowley, "You can't call me a liar". (T. R. 192.) Furthermore, Rowley said something to appellant that Miles could not hear, but Miles did hear appellant immediately thereafter say, "Take off your glasses". (T. R. 249.) Rowley took off his glasses and laid them on a stove just outside the door. (T. R. 416.)

Appellant took off his glasses and put them on a box. (T. R. 90.) Both men put up their hands and started to spar. (T. R. 91, 416, 127, 279.)

At this time Miles and Foote were in the yard. Behind Rowley in the yard was a wood and trash pile (T. R. 78, Exhibits 1 to 4, T. R. 52-54) about two feet from the door of the house. (T. R. 227.) On the right of the yard, facing the alleyway, was a shed against which tools, implements and junk were strewn. (Exhibits 1 to 4, T. R. 52-54; 97.)

EVIDENCE CONFLICTING AS TO WHO STRUCK FIRST BLOW AND PROGRESS OF FIGHT.

There is a sharp conflict as to who struck the first blow. Appellant testified that Rowley struck first. (T. R. 416.) Rowley claimed that appellant struck first (T. R. 175); in this he was corroborated by Foote (T. R. 91) and Miles. (T. R. 192, 249.) Louis Strutz, who had driven into the alley for the purpose of picking up a carton from among rubbish in the alley (T. R. 254), testified that Rowley was facing appellant with clenched fists. (T. R. 279.)

The evidence is also conflicting as to the details of the altercation that followed. Appellant testified:

> "As he took off his glasses and laid them down, we were sparring around (demonstrating)—we were hitting at one another and I was fast getting out of breath, and there were two or three blows he struck me that would have been counted. And as he hit me, I hit him on the left side, which caused him to turn around. I hit him and give him a shove and he got on the ground. He started to get up and I stepped back with my foot behind my—I grabbed ahold of the rake and lifted it up in this position." (T. R. 417.)

Appellant further testified that he grabbed the rake because he became winded grappling with Rowley and wanted him to stop—that he (appellant) was through and wanted the fight to be through; that he wanted only to scare Rowley (T. R. 417) and did not strike him with the rake or with any other implement or weapon. (T. R. 418.)

vened. (T. R. 349.) He received a copy of the statement from the Federal Bureau of Investigation on September 10, 1946. (T. R. 350.) The indictment is dated October 1, 1946, and was returned October 2, 1946. (T. R. 3.)

This statement was read in evidence at the trial (T. R. 247-252) and substantially conforms to Miles' testimony at the trial.

Miles testified that he was called at a witness before the grand jury, but that the United States Attorney came to the door and told him he was not needed. (T. R. 201.)

The United States Attorney told the grand jury, however, that Miles had not been subpoenaed. (T. R. 32.)

Nevertheless, during the presentation of the case to the grand jury, the United States Attorney was told Miles was standing in the hallway outside the grand jury room. (T. R. 34.)

One member of the grand jury inquired as to whether or not Miles would be called as a witness and evidenced a desire to hear him. Although the United States Attorney had seen Miles' written statement and presumably knew the substance of his available testimony, he suggested that the grand jury take a vote. The grand jury, by a majority decision, decided to hear no more witnesses; the United States Attorney then told Miles it would not be necessary for him to appear. (T. R. 34.) Consequently, Miles was not called before the grand jury. (T. R. 32, 33.)

PHOTOGRAPHS TAKEN OF ROWLEY'S HEAD.

Brown, the police officer, went to the hospital on the day of the affray to attend an operation on Rowley's head. When he arrived at the hospital the head had been completely shaven and the operation was already in progress. (T. R. 152.)

During the operation the doctors made an incision reaching from a point half way down Rowley's forehead to the back part of his skull and then laterally toward each ear. (T. R. 300.)

Brown took four photographs of Rowley's head during the course of the operation. These photographs were admitted in evidence over the objection of appellant's counsel as being offered for no other purpose than to excite prejudice and horror in the minds of the jury and to arouse passion and prejudice by photographs of blood and bone. (Plaintiff's Exhibits Nos. 7, 8, 9 and 10, T. R. 152-9.)

The court cautioned the jury that the photographs were being admitted only for the purpose of showing the condition of the wounded man, and warned them that they should not be influenced by the horror of the subject matter. (T. R. 157.)

Exhibit No. 9 (T. R. 156) is a photograph of Rowley's skull, brain tissue, blood and fragments of bone taken during the operation. (T. R. 300.)

Exhibit No. 10 (T. R. 157) is one of the same series of pictures. (T. R. 300.)

All of these photographs were exhibited to and examined by the jury (T. R. 159) over the objection

of defense counsel. Despite the admonition of the court, the United States Attorney withdrew Exhibits Nos. 7, 9 and 10 from evidence without stating any reason whatsoever for this action. (T. R. 426.)

Exhibit No. 8 (T. R. 155), which remained in evidence, was taken after the operation had been completed (T. R. 300) and the scalp sewn up. (T. R. 301.)

STATEMENT OF POINTS RELIED UPON.

Appellant relies upon the following points:

1. That the trial court erred in giving to the jury Instruction No. 4D.

By giving said instruction to the jury, the trial court erroneously deprived appellant of the right to present to the jury his theory of defense and to have the jury consider appropriately in connection therewith the vital matter of self-defense.

In giving said instruction to the jury, the trial court also erroneously invaded the province and function of the jury by substantially directing the jury on facts within the province and function of the jury to deliberate and render a verdict upon.

The trial court wrongfully assumed in its charge that appellant had committed an assault upon Rowley and attempted to hit and injure Rowley with his fists. Both of these material facts were in issue, controverted and disputed and were matters to be determined by the jury.

2. The trial court erred in giving to the jury Instruction No. 4, wherein the court disclosed to the jury the lesser punishment which might be imposed by the court for a violation of the included offense of assault, and failed to indicate to the jury the greater punishment provided for the crime charged in the indictment, to wit, assault with a dangerous weapon.

This instruction could easily have induced the jury to render a verdict of guilty of the crime charged in the indictment in the belief and on the assumption that the court would impose the lesser punishment disclosed in the instruction; as a matter of fact, the court, on conviction, meted out the greater punishment which had not been disclosed to the jury.

3. That the trial court committed reversible error in failing to instruct the jury on the law of self-defense as applicable to the offense charged in the indictment and the included offense of assault.

4. That prejudicial error was committed in allowing photographs of the injured man's head to be introduced in evidence, exhibited to the jury and subsequently withdrawn from evidence. The only purpose of their introduction was to inflame and prejudice the jury against appellant.

5. That appellant was prejudiced in the presentation of his defense by the failure of the United States Attorney to disclose, prior to the trial, the precise theory as to the instrument or implement used by appellant in the alleged assault and by the erroneous rulings of the trial court thereon.

6. That the trial court was without jurisdiction of the offense charged on the ground that the indictment does not state facts sufficient to constitute a crime.

ARGUMENT.

FIRST POINT RAISED: 1. THAT THE TRIAL COURT ERRED IN GIVING TO THE JURY INSTRUCTION NO. 4D.

By giving said instruction to the jury, the trial court erroneously deprived appellant of the right to present to the jury his theory of defense and to have the jury consider appropriately in connection therewith the vital matter of self-defense.

In giving said instruction to the jury, the trial court also erroneously invaded the province and function of the jury by substantially directing the jury on facts within the province and function of the jury to deliberate and render a verdict upon. The trial court wrongfully assumed in its charge that appellant had committed an assault upon Rowley and attempted to hit and injure Rowley with his fists. Both of these material facts were in issue, controverted and disputed and were matters to be determined by the jury.

(a) The court's instruction (4D) that it was no defense to the crime charged in the indictment or to the included crime of assault, that the complaining witness may have voluntarily entered into a fight with appellant, each attempting to hit and injure the other with his fists, is an erroneous statement of law.

In giving Instruction 4D the trial court said, in part:

> "It is no defense to the crime charged in the indictment, or to the included crime of assault, that Rowley may have voluntarily entered into a fight with the defendant, each attempting to hit and injure the other with his fists. The crime charged against the defendant in the indictment, and the included crime of assault, are offenses against the United States." (T. R. 11.)

By giving this instruction the trial court completely removed the issue of self-defense from the jury's consideration.

As shown in appellant's statement of facts (p. 5, supra), there is positive evidence showing that Rowley struck the first blow in the altercation (T. R. 416) and voluntarily entered into a fight with appellant. (T. R. 91, 127, 416.)

It is well established that self-defense is a valid defense to a charge of assault.

State v. Stanford, 218 Ia. 951, 256 N. W. 650;

Eggers v. Commonwealth, 195 Ky. 827, 243 S. W. 1023;

Fightmaster v. Skoll, 231 Ky. 232, 21 S. W. (2d) 269;

Britton v. State, 95 Tex. Cr. R. 83, 253 S. W. 519.

Likewise the issue of self-defense in a prosecution for assault with a dangerous weapon is an issue which should be presented to the jury under proper instructions.

Meadows v. U. S., 82 Fed. (2d) 881, 883-885;
People v. Leslie, 9 C. A. (2d) 177, 48 Pac. (2d) 995;
State v. Robinson (Mo.), 182 S. W. 113;
State v. Fredericks, 136 Mo. 51, 37 S. W. 832;
Thomas v. State, 68 Okla. Cr. 63, 95 Pac. (2d) 651;
Daniel v. State, 67 Okla. Cr. 174, 93 Pac. (2d) 47;
State v. Linville, 127 Ore. 565, 273 Pac. 338.

In the *Robinson* case, supra, the court said:

"A defendant, in a criminal prosecution for assault, is entitled to an instruction on self-defense, although his own testimony is the only evidence to support it."

When self-defense is an issue the court's instructions must not take that issue from the jury.

Frank v. U. S. (C.C.A. 9th), 42 Fed. (2d) 623;
Armstrong v. U. S. (C.C.A. 9th), 5 Alaska Fed. 510, 41 Fed. (2d) 162;
Huber v. U. S. (C.C.A. 9th), 4 Alaska Fed. 763, 259 Fed. 766;
Burns v. State, 229 Ala. 68, 155 So. 561, 562;
Morris v. State, 146 Ala. 66, 41 So. 274, 282, 283;
Cobb v. State, 24 Ala. App. 358, 135 So. 417, 418;

Terry v. State, 21 Ala. App. 100, 105 So. 386;
King v. State, 19 Ala. App. 153, 96 So. 636;
Dilburn v. State, 16 Ala. App. 371, 77 So. 983;
Elliott v. State, 16 Ala. App. 464, 78 So. 633, 634;
Phillips v. State, 190 Ind. 159, 129 N. E. 466;
State v. Lionetti, 93 N.J.L. 24, 107 Atl. 47.

Nor should the issue of self-defense be taken from the jury's consideration even though the complaining witness used no weapon, but only his fists.

Meadows v. U. S., supra;
Elliott v. State, supra;
Dilburn v. State, supra.

(b) The court's instruction 4D wrongfully assumed that appellant had committed an assault upon Rowley and that appellant attempted to hit and injure Rowley with his fists, whereas these material facts were in issue, controverted and disputed and were matters to be determined by the jury.

The court's assumption is contained in the following language:

> "Even if you should believe that Rowley called the defendant a liar * * * the use of such words by Rowley * * * *would not justify an assault by the defendant upon Rowley.*" (Italics ours.)
>
> "It is no defense to the crime charged * * * that Rowley may have voluntarily entered into a fight with the defendant, *each* attempting to hit and injure the other with his fists." (Italics ours.) (Instruction 4D, T. R. 11.)

In the first part of the quoted instruction, the court clearly assumed and informed the jury that appellant

committed an assault upon Rowley. In the second part, by the use of the word "each", the court likewise assumed and informed the jury that appellant attempted to hit and injure Rowley with his fists.

These were material facts in issue, controverted and disputed, and were matters that should have been left to and resolved by the verdict of the jury.

Each question suggested by the evidence, whether offered by either side, should be submitted to the jury, regardless of whether the jury would accept the evidence as true and regardless of the trial court's opinion thereof.

McAffee v. U. S., 105 Fed. (2d) 21, 26;
Kinaid v. U. S., 96 Fed. (2d) 522, 526;
Martin v. Govt. of Canal Zone (C.C.A. 5), 81 Fed. (2d) 913;
Hendry v. U. S., 233 Fed. 5, 18;
Henderson v. State, 20 Ala. App. 124, 101 So. 88;
State v. Hatcher, 210 N. C. 55, 185 S. E. 435, 436;
Dilburn v. State, supra;
Elliott v. State, supra.

In charging the jury, the separate elements essential to constitute the crime should be stated clearly to the jury in such manner as not to render it possible for the jury to think that any disputed fact is thereby assumed to be true. As a general rule, it is error for the court, in its charge, to assume, either directly or indirectly, the existence or non-existence of any material fact in issue on which there is either no evi-

dence, or on which the evidence is controverted, or, if disputed, is such that different inferences reasonably might be drawn therefrom.

Starr v. U. S., 153 U. S. 614;
Burtnett v. U. S., 62 Fed. (2d) 452, 456;
Sturcz v. U. S., 57 Fed. (2d) 90, 92;
Ward v. U. S. (C.C.A. 9th), 4 Fed. (2d) 772;
Pincolini v. U. S. (C.C.A. 9th), 295 Fed. 468;
Jackson v. U. S., 48 App. D. C. 272, 277, 278;
Peo. v. Lee Chuck, 74 Cal. 30, 36, 15 Pac. 322;
Peo. v. Williams, 17 Cal. 142;
Peo. v. Delgado, 28 Cal. App. (2d) 665, 83 Pac. (2d) 512;
Peo. v. Haack, 86 Cal. App. 390, 397, 260 Pac. 913;
Peo. v. Parish, 59 Cal. App. 302, 210 Pac. 633;
Peo. v. Woodcock, 52 Cal. App. 412, 199 Pac. 565;
Tarver v. State, 17 Ala. App. 424, 85 So. 855, 857;
Dilburn v. State, supra;
Marsh v. State, 125 Ark. 282, 188 S. W. 815, 816;
Bridges v. State, 169 Ark. 335, 275 S. W. 671, 672;
McAndrews v. People, 71 Colo. 542, 208 Pac. 486-8, 24 A.L.R. 659;
Dwyer v. State, 93 Fla. 777, 112 So. 62;
Bates v. State, 78 Fla. 672, 84 So. 373, 375-6;
Moore v. State, 53 Ga. App. 472, 186 S. E. 469;
Vincent v. State, 153 Ga. 278, 112 S. E. 120, 128;

Peo. v. Kallista, 313 Ill. App. 321, 40 N. E. (2d) 105, 106;
Gray v. Richardson, 313 Ill. App. 626, 40 N. E. (2d) 598, 600;
Peo. v. Biella, 374 Ill. 87, 28 N. E. (2d) 111, 112;
Peo. v. Browning, 302 Ill. App. 297, 23 N. E. (2d) 736, 737;
Peo. v. Celmars, 332 Ill. 113, 163 N. E. 421, 424;
Peo. v. Harvey, 286 Ill. 593, 122 N. E. 138, 142;
Hubbard v. State, 196 Ind. 137, 147 N. E. 323, 325;
State v. Cater, 100 Ia. 501, 69 N. W. 880, 883;
State v. Thornhill, 188 La. 762, 178 So. 343, 353;
Barber v. State, 125 Miss. 138, 87 So. 485;
State v. Mazur (Mo.), 77 S. W. (2d) 839, 840;
State v. Stewart (Mo.), 29 S. W. (2d) 120, 123, 124;
State v. Johnson (Mo.), 234 S. W. 794, 795, 796;
State v. Harrington, 61 Mont. 373, 202 Pac. 577, 578;
State v. Pitman (N. J.), 119 Atl. 438, 439;
State v. Lionetti, supra;
Peo. v. Parretti, 234 N. Y. 98, 136 N. E. 306, 309, 310;
Colby v. State, 57 Okla. Cr. 162, 46 Pac. (2d) 377, 378;
Lunsford v. State, 53 Okla. Cr. 305, 11 Pac. (2d) 539, 540;
Walls v. State, 32 Okla. Cr. 108, 240 Pac. 146, 147;

State v. Andrews, 35 Ore. 388, 58 Pac. 765, 766;
Commonwealth v. Watson, 117 Pa. S. 594, 178 A. 408, 409;
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State v. Hanna, 81 Utah 583, 21 Pac. (2d) 537, 539, 540;
State v. Seymour, 49 Utah 285, 163 Pac. 789, 792;
State v. Newman, 101 W. Va. 356, 132 S. E. 728, 734;
State v. Laura, 93 W. Va. 250, 116 S. E. 251, 252.[1]

As heretofore pointed out, in giving Instruction 4D the trial court in effect stated to the jury that *appellant committed an assault upon Rowley and attempted to hit and injure Rowley with his fists.*

In so charging the jury, the trial court wrongfully assumed material and controverted facts that should have been left to the jury for determination.

Unquestionably the jury was misled and appellant was prejudiced thereby.

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[1]A perusal of the instruction found faulty in these cases and a comparison thereof with instruction 4D in the case at bar vividly illustrates and emphasizes the glaring and most harmful consequences of such highly prejudicial instructions. See Appendix for illustrations of such prejudicial instructions and the respective courts' comments thereon.

By giving instruction 4D the trial court singled out and gave undue prominence to controverted facts and favored the prosecution's theory. Such an instruction is calculated to mislead the jury and prejudice the defendant's rights.

Meadows v. U. S., supra,

where the court said:

> "* * * It is, of course, familiar law that 'to single out and declare the effect of certain facts without consideration of other modifying facts' will constitute prejudicial error."

citing

Weddel v. U. S. 213 Fed. 208, 210;
Urban v. U. S. 46 Fed. (2d) 291, 293;
Perovich v. U. S. 205 U. S. 86, 92, 27 S. Ct. 456.

To the same effect:

Lindsey v. U. S. 133 Fed (2d) 368, 375;
State v. Brannon (W. Va.), 137 S. E. 649, 650;
State v. Johnson (Mo.), 234 S. W. 794, 795, 796.

Nor should the trial court "in any manner in its charge to the jury disparage or cast suspicion upon any legitimate defense interposed in an action, such as * * * self-defense * * *, nor upon any class of legitimate evidence offered to support a defense."

Asher v. State, 201 Ind. 353, 168 N. E. 456, 458, cited with approval in:

State v. Johnson (S. D), 17 N. W. (2d) 345, 346.

SECOND POINT RAISED: 2. THE TRIAL COURT ERRED IN GIVING TO THE JURY INSTRUCTION NO. 4, WHEREIN THE COURT DISCLOSED TO THE JURY THE LESSER PUNISHMENT WHICH MIGHT BE IMPOSED BY THE COURT FOR A VIOLATION OF THE INCLUDED OFFENSE OF ASSAULT, AND FAILED TO INDICATE TO THE JURY THE GREATER PUNISHMENT PROVIDED FOR THE CRIME CHARGED IN THE INDICTMENT, TO WIT, ASSAULT WITH A DANGEROUS WEAPON.

This instruction could easily have induced the jury to render a verdict of guilty of the crime charged in the indictment in the belief and on the assumption that the court would impose the lesser punishment disclosed in the instruction; as a matter of fact, the court, on conviction, meted out the greater punishment which had not been disclosed to the jury.

In giving Instruction No. 4 (T. R. 8, 9) the trial court instructed the jury on the crime charged in the indictment (assault with a dangerous weapon) and upon the included offense of assault, and concluded this instruction by reading to the jury Section 4779 of the Compiled Laws of Alaska defining the crime of assault, which included the following language:

> "* * * shall be fined not more than $500.00 or imprisoned in the federal jail not more than six months, or both."

Nowhere in its instruction did the trial court inform the jury of the greater penalty provided for the offense charged in the indictment, i.e. assault with a dangerous weapon (six months to ten years in the penitentiary or one month to one year in a federal jail, or $100 to $1000 fine—Sec. 4778 Compiled Laws of Alaska).

After verdict the court sentenced appellant to three years in the federal penitentiary under Section 4778, supra.

Stating the lesser punishment for assault without likewise stating the greater punishment for assault with a dangerous weapon, tended to mislead and influence the jury and constituted prejudicial error.

The disclosure of a lesser penalty, without an accompanying disclosure of the greater, has been held to constitute an invitation to the jury to convict, in the belief that a penalty not greater than that disclosed would be meted out by the court.

Miller v. U. S. 37 App. D. C. 138, 143;
Bethel v. State, 162 Ark. 40, 257 S. W. 740;
Mitchell v. State, 155 Ark. 413, 244 S. W. 443, 444;
Snyder v. State, 155 Ark. 479, 244 S. W. 746;
Pittman v. State, 84 Ark. 292, 105 S. W. 874-5;
Osius v. State, 96 Fla. 318, 117 So. 859, 861;
Bryant v. State, 205 Ind. 372, 186 N. E. 322, 325;
State v. Tennant, 204 Ia. 130, 214 N. W. 708, 710;
State v. Mayer, 204 Ia. 118, 214 N. W. 710, 712;
Abney v. State, 123 Miss. 546, 86 So. 341;
Peo. v. Sherman, 264 App. Div. 274, 35 N. Y. S. (2d) 171, 175;
Peo. v. Santini, 221 App. Div. 139, 222 N. Y. S. 683, 685;
Peo. v. Chartoff, 75 N. Y. S. 1088, 1089;

Bean v. State, 58 Okla. Cr. R. 432, 54 Pac. (2d) 675;

Commonwealth v. Switzer, 134 Pa. 383, 19 Atl. 681;

Ramirez v. State, 112 Tex. Cr. App. 332.

The danger in this type of instruction lies in the fact that the jury is directed away from the consideration of the evidence and toward speculation upon what the probable punishment will be. This point is well illustrated in the case of *Miller v. U. S.,* supra, where the trial court among other things told the jury it was within the court's power to mete out any kind of punishment—heavy to light—and on conviction inflicted the maximum punishment of twenty years on the defendant.

The court said:

"While it is permissible for the trial court to caution the jury not to be influenced by the probable consequences of their verdict, as all responsibility after verdict is with the court, it is error for the court to put before the jury any considerations outside the evidence that may influence them and lead to a verdict not otherwise possible of attainment. The deliberations of the jury should revolve around the evidence before them, and should be uninfluenced by other considerations or suggestions. The moment other suggestions or considerations find lodgment in their minds, that moment they stray from the path which the law has marked out, and their verdict, in consequence, does not rest solely upon the evidence. It is a colored and false verdict. When we consider that the existence of a reasonable doubt entitled a defendant to an acquittal and that a

very slight circumstance may affect the verdict, the danger from putting before the jury anything that may improperly influence their deliberations becomes more apparent. It is an unpleasant duty for the citizen to be compelled to sit in judgment upon his fellow citizen and it is still a more unpleasant duty to be compelled to vote for his conviction. It is apparent, therefore, that if the jury receive the impression that the consequences of a conviction are not likely to be serious, such an impression, in a doubtful case, will be almost certain to affect the verdict, and where that impression is obtained from the court, the consequences are all the more serious, for the obvious reason that the jurors will assume that the court has some object in mind when it indulges in such an intimation."

THIRD POINT RAISED: 3. THAT THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO INSTRUCT THE JURY ON THE LAW OF SELF-DEFENSE AS APPLICABLE TO THE OFFENSE CHARGED IN THE INDICTMENT AND THE INCLUDED OFFENSE OF ASSAULT.

The trial court failed to give any instruction whatsoever on the issue of self-defense. Moreover, by giving Instruction 4D (T. R. 11) it completely removed that issue from the jury's consideration. This was prejudicial error.

It is the duty of the court, whether request therefor be made or not, to instruct on each and every essential question in the case so as to properly advise the jury of the issues.

Sorrells v. U. S., 287 U. S. 435, 452;

Armstrong v. U. S., supra;

Driskill v. U. S., 24 Fed. (2d) 525;
Peo. v. Leslie, supra;
Peo. v. Rallo, 119 Cal. App. 393, 6 Pac. (2d) 516;
Burns v. State, 229 Ala. 68, 155 So. 561, 562;
Davis v. State, 214 Ala. 273, 107 So. 737, 741;
Duncan v. State, 30 Ala. App. 356, 6 So. (2d) 450, 453;
Dozier v. State, 12 Ga. App. 722, 78 S. E. 203;
State v. Hatch, 57 Kan. 420, 424, 46 Pac. 708;
Lowe v. Commonwealth, 298 Ky. 7, 181 S. W. (2d) 409, 412;
Duff v. Commonwealth, 297 Ky. 502, 180 S. W. (2d) 412, 413;
Allen v. Commonwealth, 245 Ky. 660, 54 S. W. (2d) 44, 45;
Smiley v. Commonwealth, 235 Ky. 735, 32 S. W. (2d) 51;
Patrick v. Commonwealth, 234 Ky. 33, 27 S. W. (2d) 387, 389;
Commonwealth v. Saylor, 156 Ky. 249, 160 S. W. 1032;
Tucker v. Commonwealth, 145 Ky. 84, 140 S. W. 73, 74;
State v. Robichaux, 165 La. 497, 115 So. 728;
State v. Turnbo (Mo.), 267 S. W. 847, 849;
Behrens v. State, 140 Neb. 671, 1 N. W. (2d) 289, 293;
State v. Jones, 79 N. C. 630;
State v. Robertson, 191 S. C. 509, 5 S. E. (2d) 285;

Orr v. State, 146 Tex. Cr. App. 576, 177 S. W. (2d) 210;

Matterson v. State, 142 Tex. Cr. App. 250, 152 S. W. (2d) 352, 354-5;

Brickell v. State, 138 Tex. Cr. App. 101, 134 S. W. (2d) 262;

Murphy v. State, 130 Tex. Cr. App. 610, 95 S. W. (2d) 133;

Yeager v. State, 96 Tex. Cr. App. 124, 256 S. W. 914;

Thurogood v. State, 87 Tex. Cr. App. 209, 220 S. W. 337;

Collins v. State, 82 Tex. Cr. App. 24, 198 S. W. 143;

Teel v. State (Tex. Cr. App.), 69 S. W. 531, 533;

Morzee v. State (Tex. Cr. App.), 51 S. W. 250, 251.

In *State v. Stanford,* supra, in discussing the rights of a defendant who gave evidence of self-defense in answer to a charge of assault and battery, the court said:

> "The trial court submitted the crime of assault and battery as an included offense. It was the duty of the court *on its own motion* to fully and correctly state the law in relation to this offense, and, in view of the defense made, to advise the jury of the defendant's right of self-defense as it related to the crime of assault and battery." (Italics ours.)

To the same effect:

State v. Bryant, 213 N. C. 752, 197 S. E. 530, 533;

State v. Williams, 185 N. C. 685, 687;

Skelly v. State, 64 Okla. Cr. 112, 77 Pac. (2d) 1162.

The positive testimony of appellant clearly injected the theory of self-defense into this case.

Appellant testified that Rowley hit him three or four times in a matter of seconds; that appellant's wind wasn't very good; that as Rowley struck him, appellant hit him on the left side and gave him a shove, and that as Rowley started to get up appellant grabbed hold of a rake because he was winded and wanted Rowley to stop. Appellant then testified that he was through; that he wanted the fight to be through and grabbed the rake to scare Rowley——to get him to stop. (T. R. 416-7.) Appellant further testified that he never struck Rowley with any implement. (T. R. 418.)

Foote corroborated appellant to some extent. He testified that when Rowley was falling the first time, appellant was backing away from him toward the door of his house. (T. R. 91, 93.)

Under these facts, appellant was entitled to have the jury instructed on his theory of defense, namely self-defense.

Appellant was entitled to have the jury so instructed even though his tsetimony might have been the only evidence supporting such theory.

In *Richardson v. Commonwealth,* 273 Ky. 321, 116 S. W. (2d) 639, 640, the trial court failed to give an instruction on accidental killing, despite defendant's testimony that the shooting was accidental. The court, in holding that failure to instruct on defendant's theory of the case was prejudicial error, stated:

> "The rule is firmly established that the court must give instructions in criminal cases applicable to every state of the case deducible from the evidence, and the accused is entitled to instructions submitting his theory of the case *as disclosed by his testimony.*" (Italics ours.)

To same effect:

Gibson v. State, 89 Ala. 121, 8 So. 98, 100;
Dozier v. State, supra;
Jackson v. Commonwealth, 265 Ky. 458, 97 S. W. (2d) 21, 23;
Glover v. Commonwealth, 260 Ky. 48, 83 S. W. (2d) 881, 882;
Huff v. Commonwealth, 250 Ky. 486, 63 S. W. (2d) 606;
Garrison v. Commonwealth, 236 Ky. 706, 33 S. W. (2d) 698, 700;
State v. Arnett, 258 Mo. 253, 167 S. W. 526, 528;
State v. Fredericks, supra;
Baker v. State, 109 Tex. Cr. App. 433, 5 S. W. (2d) 149;
Collins v. State, supra.

FOURTH POINT RAISED: 4. THAT PREJUDICIAL ERROR WAS COMMITTED IN ALLOWING PHOTOGRAPHS OF THE INJURED MAN'S HEAD TO BE INTRODUCED IN EVIDENCE, EXHIBITED TO THE JURY AND SUBSEQUENTLY WITHDRAWN FROM EVIDENCE. THE ONLY PURPOSE OF THEIR INTRODUCTION WAS TO INFLAME AND PREJUDICE THE JURY AGAINST APPELLANT.

Appellee's Exhibits 7, 8, 9 and 10 were admitted in evidence over the objection of appellant and were exhibited to the jury. These exhibits were all photographs of the complaining witness's head taken during the progress of and after an operation upon him. The photographs are reproduced in the appendix of the brief. Appellant objected to these exhibits on the ground that they were offered for no other purpose than to excite prejudice and horror in the minds of the jury and to arouse passion and prejudice by depicting blood and bone. (T. R. 152-9.)

Of the four photographs, Exhibits 7, 9 and 10 were taken before the operation was completed and showed the long T shaped open incision made by the surgeons; the opening in the skull and the exposed brain tissue, fragments of bone and blood. Exhibit 8 was taken after the operation had been completed and the wound sewn up. (T. R. 300-301.)

After all of the testimony had been taken in the case and just before the arguments to the jury, the United States Attorney, without any explanation, withdrew Exhibits 7, 9 and 10 from evidence and requested that they not go to the jury. (T. R. 426.)

It is appellant's contention that this conduct on the part of the United States Attorney clearly demon-

strates that his only purpose in offering the photographs showing the large incision, brain tissue, bone fragments and blood in the open skull, was to excite prejudice and horror in the minds of the jury. No other reasonable explanation can be offered in view of the fact that Exhibit 8 (the photograph taken after the wound had been closed) was left in evidence. This position is made conclusive by the fact that only Exhibit 8 was actually used by Dr. Romig (a prosecution witness) to explain the position and nature of the wound. (T. R. 300-301.)

Exhibits 7, 9 and 10 were not used or referred to by any witness for the purpose of illustrating the nature, position or character of Rowley's wound. These exhibits were merely identified, introduced in evidence, shown to the jury and then withdrawn at the close of the testimony.

The case of *State v. Miller,* 43 Ore. 325, 327-329, 74 Pac. 658, contains a clear elucidation of improper use of photographs as evidence. There the court said:

> "There is a limit, however, to the use of photographs as evidence, and, while they are competent for some purposes, they are not competent or appropriate for all. Generally, they may be used to identify persons, places, and things; to exhibit particular locations or objects where it is important that the jury should have a clear idea thereof, and the situation may thus be better indicated than by the testimony of witnesses, or where they will conduce to a better or clearer understanding of such testimony. * * * But unless they are necessary in some matter of substance,

or instructive to establish material facts or conditions, they are not admissible, especially when they are of such a character as to arouse sympathy or indignation, or to divert the minds of the jury to improper or irrelevant considerations." (Citing cases.)

Bearing in mind that Exhibits 7, 9 and 10 were in no way related to the testimony of any witness in the case so as to show the nature or character of the actual wound, the following language of the court in the *Miller* case, supra, is especially appropriate:

"The photographs here introduced were wholly unnecessary as proof of the number of shots fired, or the direction from which they were discharged, as it respects the person of the deceased. Nor did they serve to elucidate or to explain the testimony of the witnesses in the case. The shot wounds were distinctly visible upon the body, where also could be seen the direction from which they took effect, and all conditions attending them were susceptible of being established in the ordinary way by the testimony of the witnesses who had occasion to observe and examine them, so that photographic representations of the appearance of the body were neither necessary nor instructive for indicating the existing conditions. Beyond this, the pictures were not faithful reproductions, as one witness testified that they did not show the oblique character of some of the wounds, and they presented a gruesome spectacle of a disfigured and mangled corpse, very well calculated to arouse indignation with the jury, and were manifestly harmful instrumentalities for use as evidence against the defendants, without

being useful, in a legitimate sense, for the state. There was error, therefore, in permitting them to go to the jury."

To the same effect:

Baxter v. Chi. N. W. R. Co., 104 Wis. 307, 80 N. W. 644;

Selleck v. City of Janesville, 104 Wis. 570, 80 N. W. 944, 47 L. R. A. 691;

Cirello v. Met. Express Co., 88 N. Y. S. 932, 933.

The fact that the United States attorney withdrew Exhibits 7, 9 and 10 from evidence can in no way serve to cure the damage done to appellant by their introduction and exhibition to the jury. Neither can the admonition of the trial court (T. R. 157) that the jury should not be influenced by the horror contained in the exhibits. As was said in *Brown v. State,* 20 Ala. App. 39, 100 So. 616:

"When prejudicial illegal testimony has been admitted, it is always a serious question as to how far such testimony, though withdrawn in the most explicit and emphatic manner, has injuriously affected the defendant. In the case of Maryland Casualty Co. v. McCallum, 200 Ala. 154, 75 South. 92, the Supreme Court said: 'This court has always regarded the practice with cautious disapproval.' (8) We cannot approve the practice here indulged, however unintentional it may have been; for to do so would result in establishing a precedent which in many cases might be hurtful in the extreme. The question under discussion is a simple one, elementary in its nature, and has

been dealt with so often by the appellate courts of this state, it should be a familiar proposition of law to every attorney at the bar and certainly to all trial judges; and to the solicitors who represent the state in the trial of criminal cases. It is not proper practice to burden a defendant's case by introducing in evidence patently illegal, irrelevant, inadmissible and prejudicial facts, and allow this evidence to remain with the jury throughout the trial and until all the testimony is in, and then to simply tell the jury not to consider it. As stated in Cassemus v. State, 16 Ala. App. 61, 75 South. 267, 'The poison that had been injected would be difficult to eradicate.' "

To like effect:

Cadle v. State, 27 Ala. App. 519, 175 So. 327, 329.

Appellant submits that the practice condemned in the *Brown* case, supra, is precisely the practice that was indulged in in this case.

FIFTH POINT RAISED: 5. THAT APPELLANT WAS PREJUDICED IN THE PRESENTATION OF HIS DEFENSE BY THE FAILURE OF THE UNITED STATES ATTORNEY TO DISCLOSE, PRIOR TO THE TRIAL, THE PRECISE THEORY AS TO THE INSTRUMENT OR IMPLEMENT USED BY APPELLANT IN THE ALLEGED ASSAULT AND BY THE ERRONEOUS RULINGS OF THE TRIAL COURT THEREON.

The trial court erred and abused its discretion in overruling the motion of appellant for a new trial, based on the ground of the misconduct of the United States Attorney in withholding evidence from the

Grand Jury, as to the character of the weapon alleged to have been used in the assault charged in the indictment, and in failing to disclose such evidence until during the progress of the trial. By this misconduct the appellant was prevented from having a fair trial.

SIXTH POINT RAISED: 6. THAT THE TRIAL COURT WAS WITHOUT JURISDICTION OF THE OFFENSE CHARGED ON THE GROUND THAT THE INDICTMENT DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CRIME.

The trial court erred in denying the motion of appellant made during the course of the trial and after witnesses had testified on behalf of the government, that all the evidence in the case be stricken out and the jury instructed to disregard it, on the ground that the court had no jurisdiction of the case because the indictment does not state facts sufficient to constitute a crime. (T. R. 323 and 338.)

The trial court also erred in denying appellant's motion in arrest of judgment, which was based on the grounds:

1. The indictment does not state facts sufficient to constitute an offense against the United States.

2. The court is without jurisdiction of the offense attempted to be charged in the indictment. (T. R. 31.)

THE SUFFICIENCY OF THE INDICTMENT.

Appellant contends that the indictment is defective in that it does not inform the accused of the "nature and cause of the accusation", within the meaning of the Sixth Amendment to the Constitution of the United States.

In sustaining the indictment the trial court rendered a quite voluminous oral opinion, comprehensive in scope, considering that it was rendered in the midst of the trial, and to which the court adhered in overruling the motion in arrest of judgment.

The views expressed by the trial court in sustaining the indictment indicate that the conclusions arrived at were influenced by what it considered changes in the law as to the essential allegations of a good indictment, brought about by a relaxation of the strict rules of criminal pleading, as evidenced by State codes, court decisions, and the Federal Rules of Criminal Procedure. (T. R. 324 and 335.)

On account of the trial court's apparent misconception of the true meaning of the words in the Sixth Amendment, "the nature and cause of the accusation", the true function of a bill of particulars, and the force and effect of 18 U. S. C. A. 556, we feel it necessary to ask the Court's indulgence to briefly review the development of the law under the Sixth Amendment before proceeding to an analysis of the indictment itself.

THE SIXTH AMENDMENT.

The Sixth Amendment in part provides that the accused shall enjoy the right:

> "* * * to be informed of the nature and cause of the accusation * * * ."

What is meant by the language "nature and cause of the accusation" is illustrated by a long and unbroken line of decisions of the highest courts, establishing a doctrine to which the latest decisions still adhere, showing that there has been no modification of the law as to the fundamental essentials of a valid indictment.

"The object of the indictment is:

> First, to furnish the accused with such a description of the charge against him as will enable him to make his defense, * * * ."
>
> *U. S. v. Cruikshank,* 92 U. S. 542, 558, 23 L. Ed. 588.

> "* * * the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense, * * * An indictment not so framed is defective, * * * ."
>
> *U. S. v. Simmons,* 96 U. S. 360, 362, 24 L. Ed. 819.

> "Undoubtedly, the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the *specific offense,* coming under the

general description, with which he is charged." (Italics ours.)

U. S. v. Hess, 124 U. S. 483, 487, 8 S. Ct. 571.

"The basic principle of English and American jurisprudence is that no man shall be deprived of life, liberty or property without due process of law; and notice of the charge or claim against him, not only sufficient to inform him that there is a charge or claim, but so distinct and specific as clearly to *advise him what he has to meet,* and to give him a fair and reasonable opportunity to *prepare his defense,* is an indispensable element of that process." (Italics ours.)

Fontana v. U. S., 262 Fed. 283, 286.

This doctrine is approved in *Lynch v. United States,* 10 Fed. (2d) 947, and in *Jarl v. United States,* 19 Fed. (2d) 891.

To the same effect:

U. S. v. Ferranti, 59 F. Supp. 1003, 1005;

White v. U. S. (C. C. A. 10th), 67 F. (2d) 71, 72, 73;

Blake v. State, 147 Tex. Cr. App. 333, 180 S. W. (2d) 351-353.

In the recent case of *Lowenbury v. United States* (C. C. A. 10th), 156 Fed. (2d) 22, the court "gets back to first principles" in the following clear statement (page 23):

"While the strict rules of pleading in criminal prosecutions have been relaxed, the fundamental functions and requirements of indictments have

not been altered or modified. The purpose of an indictment still is to inform the accused of the offense with which he is charged, and this it must do with sufficient clarity to enable him to adequately prepare his defense and to plead the judgment of conviction, if any, as a bar to further prosecution. The essential elements of an indictment were stated by the Supreme Court in United States v. Hess, 124 U. S. 483, 8 S. Ct. 571, 574, 31 L. Ed. 516, as follows: 'The object of the indictment is—First, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated; not conclusions of law alone. * * *''

Also, in *Sutton v. United States,* 157 Fed. (2d) 661, 663, is the following:

"The Sixth Amendment of the federal constitution requires that in every criminal prosecution the accused shall be informed of the nature and cause of the accusation against him. This means that he shall be so fully and clearly informed of the charge against him as not only *to enable him to prepare his defense* and *not be taken by surprise at the trial,* but also that the information as to the alleged offense shall be so definite and certain that he may be protected by a plea of former jeopardy against another prosecution for the same offense." (Italics ours.)

"If the information in the instant case failed to meet either of these requirements, it contained a constitutional defect or omission that prejudicially affected the substantial rights of appellant."

And on rehearing of the *Sutton* case, the subject is further elucidated as follows (page 669):

"'* * * Rule 34 is merely declaratory of existing law; it does not conflict with 18 U. S. C. A. Sec. 556 or 28 U. S. C. A. Sec. 391, but should be interpreted harmoniously with these procedural statutes, and neither this rule nor these statutes *impaired or restricted the right of an accused to be fully and definitely informed of the particular charge against him.* Every defendant in a criminal case has the right to be informed of the essential *factual* elements of the offense sought to be charged. The Sixth Amendment guarantees it. To withhold essential facts that are required to describe the accusation with reasonable certainty is to deny full information of the nature and cause of the accusation." (Italics ours.)

* * * * * * *

"No case has yet been found by me which declares that failure to charge the essential element of an offense is a mere technicality; on the contrary, there is general concurrence in the statement that if 'the indictment fails to state facts sufficient to constitute the crime charged, the judgment of conviction cannot, of course, be sustained. Sonnenberg v. United States, 9 Cir., 264 F. 327, 328; Wong Tai v. United States, 273 U. S. 77, 80, 47 S. Ct. 300, 71 L. Ed. 545; Wishart v. United States, 8 Cir., 29 F. 2d 103, 106; Shilter v. United

States, 9 Cir., 257 F. 724, and this even in the absence of an attack of any kind upon the indictment in the court below. Sonnenberg v. United States, 9 Cir., 264 F. 327, 328.

'Where the indictment has been challenged by demurrer, raising not technicality, but matters of substance, and the demurrer has been erroneously overruled, but that much more is it clear that a conviction upon such indictment must be reversed. Moore v. United States, 160 U. S. 268, 16 S. Ct. 294, 40 L. Ed. 422.

'Technicality and substance are not so confused in my mind as that I can bring myself to believe that failure to charge the substantive elements of a federal offense constitutes "technical error, defect or exception which does not affect the substantial rights" of the defendant.'

"It is expressly held in the above case that an indictment is fatally defective if it omits an essential element of the offense sought to be charged; and that the right of an accused to be informed of the nature and cause of the accusation against him is a substantial right, the enjoyment of which is assured by the Sixth Amendment. Then for good measure the court adds: 'It is not a mere technical or formal right, within the meaning of 18 U. S. C. A. Sec. 556 or 28 U. S. C. A. Sec. 391.'

"It is true that these rulings were upon demurrers to indictments, but this is immaterial since the defect was not technical but substantial. In fact, there can be no more substantial error committed against a defendant than the denial of his constitutional rights under the Sixth Amendment. For such an error it was held in Johnson

> v. Zerbst, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461, 146 A.L.R. 357, that the court lost jurisdiction of the case. There the court said, 304 U. S. at page 468, 58 S. Ct. at page 1024, 82 L. Ed. 1461, 146 A.L.R. 357: 'If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed'."

The *Sutton* case, decided in 1946, not only brings up to date the doctrine established by the authorities heretofore cited, but clearly explains to what extent the provisions of 18 U.S.C.A. Sec. 556 and 28 U.S.C.A. Sec. 391 affect the question of the sufficiency of a given indictment. The *Sutton* case clears the confusion resulting from the decisions of some courts, which, regarding these sections as cure-alls, have misapplied them in upholding indictments of doubtful sufficiency.

A recent case, although a District Court decision, citing and following the rule in the *Sutton* case, presents a clear statement on this subject. In that case, *U. S. v. Koon Wah Lee,* 6 F.R.D. 456, 457, 458, the court said:

> "Following largely the doctrines laid down in Sutton v. United States, 5 Cir., 157 F. 2d 661, 663, and authorities cited therein, I am of opinion that the indictment does not sufficiently describe, concisely and definitely a crime against the United States, or with sufficient clarity and certainty inform the defendant of the nature and cause of the charge against him so as to bring it within the purview of Rule 7(c) of the new Federal Rules of Criminal Procedure, 18 U.S.C.A.

following section 687, or within the requirements of the Sixth Amendment of the Constitution, so as to exclude it from the operation of Rule 34.

'The Sixth Amendment of the federal constitution requires that in every criminal prosecution the accused shall be informed of the nature and cause of the accusation against him. This means that he shall be so fully and clearly informed of the charge against him as not only to enable him to prepare his defense and not be taken by surprise at the trial, but also that the information as to the alleged offense shall be so definite and certain that he may be protected by a plea of former jeopardy against another prosecution for the same offense.'

'If the information in the instant case failed to meet either of these requirements, it contained a constitutional defect or omission that prejudicially affected the substantial rights of appellant.' Rule 34 requires that the courts shall arrest judgment if the indictment does not charge an offense. Statutes, 18 U.S.C.A. Sec. 556 and 28 U.S.C.A. Sec. 391, requiring trial courts to disregard formal defects in indictments do not impair right of defendant to be fully and definitely informed of the charge against him. 157 F. 2d 669.''

The modern rules of criminal pleading have recognized these statutes to the extent only of relaxing the rigor of old common law rules, and dispensing with technical matters of form.

To that extent and to that extent only do they affect the question of the sufficiency of a given indictment.

"While the strict requirements and the formalities of criminal pleading under the common law rules have been modified by modern practice and statute (Sec. 556, 18 U.S.C.A.) this does not mean that matters of substance may be omitted from the allegations of an indictment.

* * * * * * *

"In a criminal proceeding the indictment must be free from ambiguity on its face; the language must be such that it will leave no doubt in the minds of the court or defendant of the exact offense which the latter is charged with. It should leave no question in the mind of the court that it charges the commission of a public offense."

Harris v. U. S., 104 Fed. (2d) 41, 45.

As stated in the *Sutton* case, supra, the provisions of neither 18 U.S.C.A. Sec. 556, nor 28 U.S.C.A. Sec. 391 impaired the right of an accused to be fully and definitely informed of the particular charge against him, and,

"'* * * 'if the indictment fails to state facts sufficient to constitute the crime charged, the judgment cannot, of course, be sustained.' * * *"

Sutton v. U. S., supra, p. 669.

Appellant contends that the indictment in this case is defective, in that it does not inform him of the nature and cause of the accusation sufficiently to enable him to make his defense, and in that it does not state facts sufficient to constitute the crime of assault with a dangerous weapon.

In the light of the decisions heretofore cited, if the indictment is basically deficient in the respects alleged, appellant has been deprived of a substantial right within the meaning of 28 U.S.C.A. Sec. 391, and the Sixth Amendment. It is not a mere "technical or formal right, within the meaning of U.S.C.A. Sec. 556."

Sutton v. United States, supra, p. 670.

The sufficiency of the indictment in the instant case, as in every indictment, can be determined only by the allegations of the indictment itself, and this determination is not aided but only confused and retarded by invoking in support of its validity, the provisions of 28 U.S.C.A. Sec. 391 and 18 U.S.C.A. Sec. 556, as was done by the trial court.

Throughout the trial court's opinion, repeated reference is made to *Myers v. United States,* 15 Fed. (2d) 977. The dissenting opinion of Judge Booth, in that case, is mentioned but treated as of little importance (T. R. 3.)

The decision in the *Myers* case was later, in effect, overruled by the same court in *Jarl v. United States,* 19 Fed. (2d) 891, 894, and the dissenting opinion of Judge Booth adopted as the correct statement of the law.

Therefore an extract from Judge Booth's opinion is enlightening (p. 987):

> "In order that the accused may 'be informed of the nature and cause of the accusation', the courts have quite uniformly held that the information or

indictment filed against him must fulfill certain requirements or meet certain tests. These tests, as laid down by this court in Miller v. United States, 133 Fed. 337, 341, 66 C.C.A. 399, 403, and other cases, are:

" 'It must set forth the facts which the pleader claims constitute the alleged transgression so distinctly as to advise the accused of the charge which he has to meet, so fully as to give him a fair opportunity to prepare his defense, so particularly as to enable him to avail himself of a conviction or acquittal in defense of another prosecution for the same crime, and so clearly that the court, upon an examination of the indictment, may be able to determine whether or not, under the law, the facts there stated are sufficient to support a conviction.'

"The tests thus laid down have been consistently recognized by this court. Goldberg v. United States (C.C.A.) 277 F. 211, 215; Armour Packing Co. v. United States, 153 F. 1, 15, 82 C.C.A. 135, 14 L.R.A. (N.S.) 400; Fontana v. United States (C.C.A.) 262 F. 283, 286; Weisman v. United States (C.C.A.) 1 F. (2d) 696; Carpenter v. United States (C.C.A.), 1 F. (2d) 314; Lynch v. United States (C.C.A) 10 F. (2d) 947.

"The majority opinion seems to hold that the indictment or information will be held sufficient if it merely sets forth clearly all of the elements going to make up the offense. This holding, in my opinion, gives effect to a part only of the tests above set out. It fails to recognize the requirements of distinctness and particularity, which mean that the general description of the elements

> of the offense charged must be accompanied with such a statement of facts and circumstances as will inform the accused of the *specific offense,* coming under the general description, with which he is charged. The constitutional requirement is based upon the presumption of innocence, and therefore requires such fullness and particularity as will enable an innocent man to prepare for trial. The fullness and particularity are also requisite to enable the accused to enjoy the benefit of the provision of the Fifth Amendment in regard to double jeopardy. 31 C. J. 650, 663; Miller v. United States, supra; Naftzger v. United States, 200 Fed. 494, 502 (C.C.A. 8); Fontana v. United States, supra."

In the *Jarl* case the court, referring to the dissenting opinion of Judge Booth in the *Myers* case, said (p. 894):

> "The other propositions discussed in that case, contrary to the conclusion in the Lynch case and contrary to the view we are now attempting to maintain, were vigorously combated in a clear and forceful dissent, which we think announced the correct rule by which the sufficiency of a criminal charge must be tested."

This language explicitly overrules the decision in the *Myers* case, to which the trial judge attached great weight in his oral opinion.

If it should seem that unnecessary space has been devoted to establishing by citation of judicial decisions the meaning of the Sixth Amendment, and that the views we have advanced are too well sustained by

the authorities to require argument, may we state that sporadic instances of departure from the doctrine established by the cases cited, as instanced by the opinion of the trial judge in this case, and the decision in the *Myers* case, have made it necessary for the courts to constantly check this tendency.

A BILL OF PARTICULARS CANNOT CURE A DEFECTIVE INDICTMENT.

The trial court, in its opinion, evidenced a misconception of the true office of a bill of particulars.

The trial court, quoting again from the *Myers* case, supra, said:

> "It is incumbent upon him (the defendant) to bring sharply to the attention of the court the matters of *form* or *incompleteness* of which he complains, * * *" (T. R. 334; italics ours),

and the trial court added:

> "If the defendant in good faith had thought he was not sufficiently advised—that he was not informed of the nature and cause of the accusation against him—he could have, as soon as the indictment was returned, demanded a bill of particulars." (T. R. 334.)

An indictment basically defective, that does not state the crime, and does not inform the defendant of the nature and cause of the accusation, cannot be aided by a bill of particulars any more than it can be aided by proof. It has been so held by this court in numerous cases.

In *Foster v. United States,* 253 Fed. 481, 483 (C.C.A. 9th), the court (Judge Gilbert) states:

> "The bill of particulars could not avail to cure the defect of the indictment. A bill of particulars may be ordered by the court in its discretion in cases where the indictment, while so expressed as to be good on demurrer, still does not furnish the defendant all the information he is entitled to have before being compelled to go to trial. It does not constitute a part of the record, and it is not subject to demurrer. Commonwealth v. Davis, 11 Pick. (Mass.) 432. Not having been made by a grand jury on oath, it cannot cure the omission of material averments from an indictment, and it cannot 'give life to what was dead when it left the grand jury'.
>
> * * * * * * *
>
> " 'It is because the indictment is good as against a general demurrer that the defendant is compelled to resort to a motion for a bill of particulars. If it is bad, he has his remedy by demurrer or motion in arrest.' "

And in *Collins v. United States,* 253 Fed. 609, 610 (C.C.A. 9th), this court, speaking through Judge Wolverton, says (p. 610):

> "It should be premised that a bill of particulars can in no way aid or render sufficient an indictment fundamentally bad. The office of a bill of particulars, where the indictment is good, is to render the defendant more particular information as to matters essential to his defense. It is directed to the discretion of the court, and before compelling the defendant to go to trial."

And in *Jarl v. United States,* supra, the court says (p. 894):

> "It is contended that if the first and second counts were not good the defendants had it within their power to cure the defect by requesting a bill of particulars; but that is no remedy for material and substantive omissions from the charge."

In discussing the *Jarl* case, supra, Judge Kennedy in *White v. U. S.*, supra (p. 78), said:

> "* * * And we endeavored to point out in the Jarl case that a bill of particulars could not supply a necessary element of the charge, nor could the prosecuting officer in that way change or amend a charge of a grand jury."

In the *Myers* case, immediately preceding the language quoted by the trial court, appears the following (p. 985):

> "It will not do, however, for a defendant to remain silent when a case *sufficient against general demurrer is stated against him.*" (Italics ours.)

Thus, even the *Myers* case, on which the trial court relies so implicitly (although overruled in every important particular), does not demand the high degree of cooperation from a defendant which the trial court did impose upon appellant.

It is clear from all the authorities that it is only as to matters of form and not of substance, that a defendant can be penalized by his silence. The burden

is at no time upon a defendant to see to it that the indictment states a cause of action.

Without inquiring as to what it would avail appellant to demand a bill of particulars as to matters which the indictment states were "to the grand jury unknown", it is submitted that if appellant had in good faith thought he was not informed of the nature and cause of the accusation against him, he was under no duty or compulsion to demand a bill of particulars.

IT IS PRESUMED THAT A DEFENDANT IS IGNORANT OF WHAT IS INTENDED TO BE PROVED AGAINST HIM.

For the purpose of determining the sufficiency of the indictment in respect to informing a defendant of the nature and cause of the accusation against him and with respect to its fulfilling the statutory requirements, it is important to keep in mind a rule of law that is approved by all the authorities, without exception, which is:

> "As every man is presumed to be innocent until proved to be guilty, he must be presumed also to be ignorant of what is intended to be proved against him, except as he is informed by the indictment or information."

This doctrine is stated in *People v. Marion,* 28 Mich. 255, 257, and is approved and quoted in the following cases:

State v. McKenna, 24 Utah 317, 67 Pac. 815;
State v. Topham, 41 Utah 39, 123 Pac. 888;

Hemphill v. State, 52 Okla. Cr. 419, 6 Pac. (2d) 450.

To the same effect:

U. S. v. Ferranti, supra;

Blake v. State, supra;

State v. Hale, 71 Utah 134, 263 Pac. 86, 88.

> "When one is indicted for a serious offense, the presumption is that he is innocent thereof and consequently that he is ignorant of the facts on which the pleader founds his charges, and it is a fundamental rule that the sufficiency of an indictment must be tested on the presumption that the defendant is innocent of it and has no knowledge of the facts charged against him in the pleading."
>
> *Fontana v. United States,* supra (p. 286).

Citing the *Fontana* case, supra, the Circuit Court of Appeals of the 8th Circuit, in *Lynch v. United States,* supra, stated as follows (p. 949):

> "Where one is indicted for a serious offense, the legal presumption is that he is not guilty; that he is ignorant of the supposed facts upon which the charge is founded. A demurrer to the indictment must be considered and determined on that presumption, on the presumption that the defendant does not know the facts that the prosecutor thinks make him guilty, and that he is unable to procure and present the evidence in his defense and is deprived of all reasonable opportunity to defend unless the indictment clearly discloses the earmarks, the circumstances and facts surrounding the case of the alleged offense, so

that the defendant can identify, procure witnesses and make defense to it."

The trial court conceded the above principle in its oral opinion. (T. R. 325.)

The rule is reiterated in *U. S. v. Koon Wah Lee,* supra (p. 459), where the court said:

"A defendant being in law presumed to be innocent before and throughout every stage of the trial, it follows that he is presumed to be wholly ignorant that there exists any evidence to convict him of a crime unless the indictment or information sets out plainly, concisely and definitely the essential facts constituting the offense charged. He should not be required to prepare to overthrow unforeseeable evidence that may tend to establish criminal acts not clearly charged against him or included within acts so charged, nor should he be required to prepare and defend against acts which do not plainly describe a crime."

The lower court's analysis of the indictment consists of the following brief statement (T. R. 332, 333):

"The indictment in this case charges the defendant with having 'within the jurisdiction of this court' and 'being then and there armed with a dangerous weapon to wit, a long handled implement, a more exact description of said long handled implement being to the Grand Jury unknown and therefore not stated, did then and there wilfully, feloniously and unlawfully make an assault upon another, to wit, Frank Rowley, with said long handled implement by then and there striking, beating, and wounding the head of the said

> Frank Rowley with the said long handled implement * * *'
>
> "I suggest that there is not a citizen of ordinary intelligence who would now know *precisely* what a defendant had to meet on a trial of that case, and if there are some additional things which he thinks he ought to know, he can find them out by a bill of particulars." (Italics ours.)

The principle is thus well established by unanimous authority, and conceded to be the law by the learned trial judge (T. R. 325), that a defendant is presumed to be absolutely ignorant of what evidence the Government intends to produce against him. From the indictment in the present case it is apparent that even the Grand Jury was unable to describe the weapon alleged to have been used by appellant except as a "long handled implement".

It is presumed that appellant did not know that evidence would be introduced tending to show that such implement was a rake. He was also presumed not to know that evidence would be introduced for the purpose of showing that, as a result of the alleged assault, Rowley's skull was fractured. The United States Attorney stated that even he did not know until during the progress of the trial, that the "long handled implement" referred to in the indictment was a rake, that he came to that conclusion from an experiment performed by Joseph Earl Cooper, Assistant United States Attorney, in his presence, on November 6, 1946 (which experiment, however, was not repeated in the presence of the jury). (T. R. 35.)

In view of all of these circumstances it is difficult to understand how the trial court could arrive at the conclusion, as it did, that "there is not a citizen of ordinary intelligence who would not know *precisely* what the defendant had to meet on a trial of the case." (Italics ours.) (T. R. 332, 333.)

The trial court then proceeded to state that:

> "* * * if there are some additional things which he thinks he ought to know he can find them out by a bill of particulars." (T. R. 333.)

Such a bill of particulars would have to be furnished by a United States attorney, who, the record discloses, claims he did not have this information, and on the order of a court which had already expressly stated that the defendant was informed by the indictment of *precisely* what he had to meet.

AN INDICTMENT PLEADING ONLY THE WORDS OF THE STATUTE IS NOT SUFFICIENT IN THE CASE AT BAR.

Inasmuch as in the argument in the lower court, the government relied strongly on cases upholding indictments drawn in the words of the statute defining or denouncing the offense, one more principle of criminal pleading remains to be established, and that is, that an indictment in the words of the statute is not sufficient unless the statute defines a complete crime.

This means, in the light of the authorities hereinbefore cited, that if the words of the statute inform

a defendant of the "nature and cause of the accusation", sufficiently to enable him to prepare his defense; to enable the court to pronounce judgment, and to protect a defendant against further prosecution for the same offense, the indictment drawn in the words of the statute is sufficient, otherwise not.

This principle of criminal pleading is sustained by the authorities as follows:

> "It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species,—it must descend to particulars. 1 Archb. Crim. Pr. & Pl. 291. The object of the indictment is—First, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated; *not conclusions of law alone.* A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances." (Italics ours.)
>
> *U. S. v. Cruikshank,* supra (p. 558).

The above language is expressly approved in *U. S. v. Hess,* supra, and *U. S. v. Carll,* 105 U. S. 611, 26 L. Ed. 1135.

In *State v. Topham,* supra, the authorities on this subject, including those above cited and many others, are reviewed in an able and voluminous opinion.

In *Lowenburg v. U. S.,* supra, the same doctrine is announced, the court quoting from the opinion in *U. S. v. Hess,* supra.

The following language in *Fletcher v. State,* 2 Okla. Cr. 300, 101 Pac. 599, 604, is to the same effect.

> "It is a general rule of law that, if an indictment uses the words of a statute, or words of equal import, to this extent the indictment or information is good. But suppose that an indictment for murder, *or for an assault,* or for larceny, perjury, libel, embezzlement, or for any offense, would simply use the language of the statute, who is bold enough to assert that this is all that the law requires, and that such an indictment or information would be sufficient to charge any offense?" (Italics ours.)

The above-quoted language is approved in *Cole v. State,* 15 Okla. Cr. 361, 177 Pac. 129, 130.

In nearly all the foregoing decisions the requirement that the accused be given sufficient information to "enable him to prepare his defense" is stated as the prime essential of the indictment.

So from 1875, when Chief Justice Waite rendered the opinion in the *Cruikshank* case down to the *Lowenburg* decision in 1946, a period of 71 years, the rule as to the essentials of an indictment, whether charging a statutory or common law crime has re-

mained unchanged, and as stated in the *Sutton* case, supra (p. 669) (on rehearing), neither 18 U.S.C.A. 556, nor 28 U.S.C.A. 391,

> "impaired or restricted the right of an accused to be fully and definitely informed of the particular charge against him. Every defendant in a criminal case has the right to be informed of the essential *factual elements* of the offense sought to be charged. The Sixth Amendment guarantees it. To withhold essential facts that are required to describe the accusation with reasonable certainty is to deny full information of the nature and cause of the accusation." (Italics ours.)

The statute alleged to be violated in this case does not purport to define the crime of assault with a dangerous weapon, but simply prescribes the punishment for doing a certain act, which is designated in general terms, in fact in thirteen words as follows:

> "whoever, being armed with a dangerous weapon shall assault another with such weapon," (Sec. 4778 Alaska Compiled Laws.)

We believe that the great weight of authority sustains the following propositions:

> First: In charging the offense of assault with a dangerous weapon, where the weapon charged to have been used is a dangerous weapon *per se,* or *ex vi termini,* such as a gun, sword, pistol, dirk, and the like, or where the weapon is among those designated by statute as "dangerous" or "deadly" then no further description is necessary.

> Second: Where the weapon charged to have been used is not dangerous *per se,* then a sufficient description of such weapon, the manner of its use and effect produced thereby should be set forth in the indictment.

Many well-reasoned cases support the two propositions above advanced. We review some of them.

In *Moody v. State,* 11 Okla. Cr. 471, 148 Pac. 1055, the indictment charged the defendants with making an assault upon the person of one W. May, "by then and there striking the said W. May with a dangerous weapon, to-wit, a wooden plank."

Upon a demurrer to the indictment the defendants contended that it was too indefinite in that it did not describe the plank and designate in what manner it was used. Their contention was that if a plank is not *per se* a deadly weapon the county attorney was required to plead facts sufficient to show the character of the plank and the manner in which it was used; and that the facts so pleaded must show that the instrument used was of the character set out in the statute and used in such manner as to be reasonably calculated to produce serious bodily injury. The court upheld these contentions, stating (p. 1056):

> "It is a matter of common knowledge that a plank can be used as a weapon of offense or defense in numerous ways without inflicting serious bodily injury or intending to inflict such injury. A plank can also be used in a manner calculated to produce death or serious bodily injury. We are of opinion that the information should have set

out facts sufficient to indicate that an assault with a sharp and dangerous weapon with intent to do bodily harm with justifiable or excusable cause was committed, in view of the fact that the weapon charged was not necessarily a deadly or a dangerous weapon per se. Such a ruling imposes no burdensome duty upon the county attorneys, and in no way tends to interfere with the proper enforcement of the law, but is a reasonable and fair interpretation of the statute, to which the citizenship is entitled. In our judgment the demurrer should have been sustained."

And in *Ponkilla v. State,* 69 Okla. Cr. 31, 99 Pac. (2d) 910, 912, the court said:

"We have long adhered to the rule that when the weapon charged to have been used is not a deadly weapon per se, a sufficient decription of such instrument, the manner in which it was used, and the effect produced by the use thereof should be set forth * * *"

"An ordinary pocket knife is not a deadly weapon per se, and in the absence of an allegation in the information of the same being a deadly weapon, or setting out the manner by which its use might produce death, no offense of assault with intent to kill by means of a deadly weapon is stated; and the court would have no jurisdiction to try the defendant under Section 1873, supra, or pronounce a judgment thereon under a conviction for this alleged offense or any lesser or included offense under said statute."

And in *Bean v. State,* 77 Okla. Cr. 73, 138 Pac. (2d) 563, the court said (p. 83):

> "It (fist) certainly is not a dangerous weapon per se, and we have consistently held that if the weapon used in an alleged assault is not deadly per se in an information charging an alleged offense * * * the information should allege facts showing a sufficient description of such weapon, the manner in which it was used, and the effect produced by the use thereof."

In *State v. Harrison,* 225 N. C. 234, 34 S. E. (2d) 1, the court said (p. 2):

> "It may not be amiss to call attention to the fact that the 'deadly weapon' in the bill of indictment is simply designated as 'a certain ice pick' without further description, and that it might be an act of proper precaution to procure another bill containing a description of the implement alleged to have been used, such as its weight, size, and material out of which made."

And in *State v. Porter,* 101 N. C. 713, 7 S. E. 902, 903, the court said:

> "The court must be able, from an inspection of the charge, in the terms in which it is made in the indictment, to see that its jurisdiction attaches; that the weapon with which the assault was made was a deadly instrument, *not merely by calling it 'deadly'* unless by so describing it by name or with such attending circumstances as show its character as such; and, when so described, the jurisdiction becomes apparent and will be exercised. The present indictment manifestly falls short of this requirement; for, while called a 'deadly weapon', it is designated simply as a 'stick', with no description of its size, weight,

> or other qualities or properties, from which it can be seen to be a deadly or dangerous implement, calculated in its use to put in peril life, or inflict great physical injury upon the assailed." (Italics ours.)

The above last-quoted language is extremely applicable to the indictment in question, which, while alleging the implement used to be dangerous, designates it simply as "a long handled implement," with no further description whatever.

To the same effect, *Parks v. State,* 95 Tex. Cr. R. 207, 253 S. W. 302. There the indictment charged an assault with a knife. This description of the alleged weapon was held to be insufficient.

In *Commonwealth v. White,* 33 Ky. L. R. 70, 109 S. W. 324, 325, the indictment charged a violation of the statutory offense of "drawing a deadly weapon upon another, or pointing a deadly weapon at another." The court says:

> "The rule is that, 'where the words of the statute are descriptive of the offense, the indictment will be sufficient if it shall follow the language and expressly charge the exact offense of the defendant.' But this rule applies only to offenses which are complete in themselves, when the acts set out in the statute have been done or performed. * * * We think this indictment is defective, in that it fails to describe the instrument claimed to be a deadly weapon. It might have been a pistol. It might have been a dirk, a sword, or a heavy, murderous bludgeon. Under this indictment the defendant would not be apprised of the circum-

stances that he would be required to meet and rebut at the trial. * * * The statement in the indictment that the defendant 'did unlawfully and wilfully point a deadly weapon at W. O. B. Lipps' *is a conclusion of the pleader,* insofar as it refers to the character of the weapon. The weapon may be deadly or not, according to its nature or to the manner of its use. Commonwealth v. Duncan, 91 Ky. 595, 16 S. W. 530. *The weapon should be so described in the indictment that the fact that it is a deadly weapon as used must appear from the language of the charge.* Whether a particular weapon, such as a club or stone, is deadly, would be a question of fact to be determined by the jury, and the fact whether it is such is to be submitted under appropriate instructions; but where the weapon charged is a pistol, a gun, a sword, or bowie knife, upon proof of that fact, under an appropriate charge contained in the indictment, a prima facie case would be made out for the prosecution. But the defendant is not required to introduce any evidence until he is first charged in appropriate language with having drawn or pointed a weapon which from its description or manner of use would be a deadly weapon. Nor is the prosecution allowed to supplement a defective charge in the indictment by sufficient proof." (Italics ours.)

IMPLEMENT DEFINED.

The indictment as heretofore stated alleges that appellant, "armed with a dangerous weapon, to wit: a long handled implement" assaulted Rowley. (T. R. 2.)

As hereinbefore pointed out, merely calling an instrument a "dangerous weapon" does not make it so. Such an allegation is merely a conclusion of the pleader.

State v. Porter, supra.

It therefore becomes necessary to define the words "a long handled implement" in order that the court and appellant can ascertain the nature of the charge in the indictment.

Appellant contends, under the authorities hereinabove cited, that the words: "a long handled implement," without further description, do not connote a dangerous weapon per se.

Accordingly, the jurisdiction of the trial court under the indictment never attached.

According to the lay dictionaries an "implement" is defined as follows:

> "Implement. An article of equipment; esp., a tool, utensil, instrument, etc., essential to the performance or execution of something."
>
> Webster's Collegiate Dictionary, 5th Ed. Copyrighted 1941 by G. & C. Merriam Co.

> "Implement. II n. 1. A thing used in work, especially in manual work; a utensil; tool."
>
> Funk & Wagnalls College Standard Dictionary, copyrighted 1943 by Funk & Wagnalls Co.

The law dictionaries define the term as follows:

> "Such things as are used or employed for a trade, or furniture of a house * * * whatever may sup-

ply wants; particularly applied to tools, utensils, vessels, instruments of labor; as, the implements of trade or of husbandry."

Black's Law Dictionary, Third Ed. (1933) p. 924;

Bouvier's Law Dictionary, Rawle's Third Revision (1914).

The decisions defining the word "implement" usually arose by construing statutes relating to the exemption of articles from execution. Under these decisions the word "implement" has come to include a large variety of items, many, which from their very nature, would be harmless in the hands of anyone. To illustrate:

"Binding twine."

Davis v. Anchor, etc. Co., 96 Ia. 70, 64 N. W. 687, 688.

"Violin and bow."

Goddard v. Chaffee, 84 Mass. 395.

"Brushes and towels of a barber."

Laguna v. Quinones, 23 P. R. R. 358.

"Photographic lens of a photographer."

Davidson v. Hannon, 67 Conn. 312, 34 Atl. 1050.

"Trained snakes of a snake charmer."

Magnon v. U. S., 66 Fed. 151, 152.

Others, because of their size or weight could not possibly be used as a weapon in the hands of a human being. Again illustrating:

"A hotel bus."
White v. Geneny, 47 Kan. 741, 28 Pac. 1011.

"A buggy."
Pluckham v. Bridge Co., 104 App. Div. 404, 93 N. Y. S. 748.

"Electric motor and lathe."
In re Robinson, 206 Fed. 176, 177.

"Miner's coal cars, mining timbers and rails."
State etc. v. Justice of Peace, etc., 102 Mont. 1, 55 Pac. (2d) 691, 694.

"Music teacher's piano."
Amend v. Murphy, 69 Ill. 337, 339.

"Printing press and equipment."
Flaxman v. Capitol City Press, 121 Conn. 423, 185 Atl. 417.

"Auto used as a taxi."
Pellish Bros. v. Cooper, supra.

"Machine for making boots."
Daniels v. Hayward, 87 Mass. 43, 44.

"Buggy and a harness."
Wilhite v. Williams, 41 Kan. 288, 21 Pac. 256, 257.

A "dangerous weapon" is one liable to produce death or great bodily harm, or be dangerous to life.
Parman v. Lemmon, 119 Kan. 323, 244 Pac. 227, 229, 44 A. L. R. 1500.

None of the items mentioned in the cases first cited above could possibly be construed as "dangerous weapons" under this definition.

THE UNITED STATES ATTORNEY WITHHELD EVIDENCE FROM THE GRAND JURY AND THEREBY PREVENTED THE GRAND JURY FROM RETURNING A VALID INDICTMENT.

The indictment described the alleged dangerous weapon as "a long handled implement, a more exact description of said long handled implement being to the Grand Jury unknown and therefore not stated." (T. R. 2 and 332.)

An allegation containing a recital "which are to the Grand Jury unknown" is permissible only when the grand jury does not have knowledge of the facts or could not have obtained such knowledge by the exercise of reasonable diligence.

U. S. v. Rhodes, 212 Fed. 513, 517;
Naftzger v. U. S., 200 Fed. 494, 501, 502;
State v. Stowe, 132 Mo. 199, 33 S. W. 799, 802;
Hunnicut v. State, 131 Tex. Cr. 260, 97 S. W. (2d) 957, 8.

Appellant contends that not only were all of the material facts proved at the trial relative to the nature of the alleged "dangerous weapon" available to the grand jury at the time the indictment was returned, but were actually in the possession of the government attorneys and investigators at that time.

The witness Miles gave a written statement to the agents of the Federal Bureau of Investigation on the date of the alleged offense, July 30, 1946, (T. R. 198-200.) In this statement he positively stated that appellant struck Rowley with a rake. (T. R. 249.)

The United States Attorney first saw this statement sometime shortly before the grand jury convened.

(T. R. 349.) He received a copy of the statement from the Federal Bureau of Investigation on September 10, 1946. (T. R. 350.) The indictment is dated October 1, 1946, and was returned October 2, 1946. (T. R. 3.)

This statement was read in evidence at the trial (T. R. 247-252) and substantially conforms to Miles' testimony at the trial.

Instead of exercising due diligence to ascertain the nature of the alleged weapon used so that it might be identified in the indictment and disclosed to appellant, the following series of events illustrate that no diligence whatsoever was used, either to bring the facts before the grand jury, or by the grand jury itself, to ascertain the facts.

Miles testified that he was called as a witness before the grand jury, but that the United States Attorney came to the door and told him he was not needed. (T. R. 201.)

The United States Attorney told the grand jury, however, that Miles had not been subpoenaed. (T. R. 32.)

Nevertheless, during the presentation of the case to the grand jury, the United States Attorney was told Miles was standing in the hallway outside the grand jury room. (T. R. 34.)

One member of the grand jury inquired as to whether or not Miles would be called as a witness and evidenced a desire to hear him. Although the United States Attorney had seen Miles' written statement and presumably knew the substance of his available

testimony, he suggested that the grand jury take a vote. The grand jury, by a majority decision, decided to hear no more witnesses; the United States Attorney then told Miles it would not be necessary for him to appear. (T. R. 34.) Consequently, Miles was not called before the grand jury. (T. R. 32, 3.)

It is thus apparent that the testimony of Miles was available to the government at all times.

Miles' knowledge of the facts had to do with an essential element of the crime charged, that is, the dangerous character of the weapon used, and, more important, it had to do with giving appellant sufficient information as to the "nature and cause of the accusation," which according to all the authorities cited, is the prime requisite of an indictment under the Sixth Amendment.

This is not a case where a prosecuting officer, presenting a case to a grand jury, from a possibly legitimate strategical motive, omits to disclose all the strength of his case, but contents himself with presenting a prima facie case, saving additional witnesses for surprise purposes.

Rather this presents a case where the prosecuting officer withheld from the grand jury testimony as to a vital matter of description, available at all times, and substituted for this available testimony, the words in the indictment, "to the Grand Jury unknown".

This practice is universally condemned by the decisions.

In *Naftzger v. U. S.,* supra, the court said: (p. 502)

"It is of great importance that the criminal laws be enforced against violators of the law, and technicalities should not be used as a shield for criminals. But it is of equal importance that the liberty of citizens should be a matter of concern, and, before a person is put on trial for a felony, an indictment should be returned against him, and that such indictment be allegations of fact, and not of recitals 'which are to the grand jury unknown.' *Such allegations are permissible from necessity* only when the grand jury does not have and *cannot obtain a knowledge of the facts.*" (Italics ours.)

And in *U. S. v. Rhodes*, supra:

"The law is well settled that a criminal charge must be made so certain that a defendant may be reasonably informed of just what he is charged with, that he may plead a conviction or acquittal of such charge to any subsequent indictment thereon. The indictment in this case, in reference to the property alleged to have been so concealed by the defendants, contains the general allegation that it consisted of goods, wares, and merchandise, the character, kind and particular description of *which is to the grand jury unknown.* These matters are important and are allegations *put in issue by the plea of not guilty.* They are allegations that must be sustained by evidence on the part of the government. Such allegations are permissible from necessity only, when the grand jury does not have and *cannot obtain a knowledge of the facts.*" (Italics ours.)

"It has been held by this court that whenever it is charged in the indictment that the property

was received by the accused from a person whose name was unknown to the grand jury, some proof must be offered that said party's name was unknown to the grand jury and that *by the exercise of reasonable diligence it could not be ascertained.*" (Italics ours.)

While *U. S. v. Rhodes,* supra, was a district court decision, the above proposition, laid down in that case, was reviewed and approved in *White v. U. S.* supra (pp. 77, 78.)

See also:

Manley v. State, 138 Tex. Cr. App. 379, 136 S. W. (2d) 613;

Hunnicut v. State, supra,

and

U. S. v. Aurandt, 15 N. M. 292, 107 Pac. 1064, 1066, 7, where the court said:

"Neither do we overlook in this connection the fact, shown by the record, that the war settlement warrant, which it ultimately appeared by photographic copy on the last day of the trial was the article of value in question, was at the date of the finding of this indictment, *in the hands of officers of the government,* and subject to the inspection of the grand jury upon proper process.

While the allegation that further particulars of a transaction are unknown is permissible in indictments under certain conditions and serves a useful purpose in preventing variances, it must not be overlooked *that its use proceeds purely upon grounds of necessity.*

With the passing of the necessity ceases the rule. It should not be so used as to withhold unneces-

sarily from defendants information which in *their proper defense they should have.*" (Italics ours.)

In *People v. Hunt, et al.,* 251 Ill. 446, 96 N. E. 220, 222, the court said:

"Where matters which ought to be stated in the indictment are omitted, and the excuse is stated that such facts were unknown to the grand jurors, the truthfulness of the excuse given is put in issue by the plea of not guilty, and the burden is upon the state to prove such allegation. * * *"

In *State v. Stowe,* supra, (p. 802) the court said:

"* * * In such circumstances as these, there was no excuse for the allegation in the indictment that the description of the horses mentioned in the mortgage was unknown, nor that the names of the mortgagor and mortgagee were unknown to the grand jury. And it is only upon the ground of necessity that such an allegation is admissible. When the necessity fails, the reason supporting such an allegation fails with it; and an indictment will be rendered invalid, and a defendant entitled to a discharge from that indictment, if it appear on the trial either that a person or thing alleged to be unknown was known, or could have been known by the exercise of ordinary diligence. Blodget v. State, 3 Ind. 403; Cheek v. State, 38 Ala. 227. Bishop says: 'If the grand jurors refuse to learn the name when they might, their ignorance of it, thus willfully produced, proceeding from no necessity, creates none; and if they lay it as unknown, proof of the facts at the trial will show the allegation to be unauthorized, and

there can be no valid conviction thereon. As said by the English judges: "The want of description is only excused when the name cannot be known." ' * * * The allegation in an indictment that a person or thing is unknown or cannot be described is a material one and it is traversed by a plea of not guilty, and must be sustained and may be rebutted by proof, and the inquiry before the petit jury will be whether the name was known to the grand jury, or could have been ascertained by due inquiry on the part of the prosecution. * * * Wharton says: 'The test is, had the grand jury notice, actual or constructive, of the name; for if so, the name must be averred.' Cr. Pl. & Prac. (9th Ed.) Sec. 113. If the averment of the name be not made, if known, or when it could readily have been ascertained, this fact, appearing at the trial, will compel a discharge of the defendant from that indictment; but this will not operate as a bar to a trial on a new indictment properly framed. Id. Sec. 112. In the present instance there is no room for doubt that if the grand jury, or their scrivener, the prosecuting attorney, had exercised a modicum of diligence, they could readily have ascertained a description of the horses which Waugh, the prosecuting witness, received from defendant in exchange, and the records of Greene county were constructive notice to them of the mortgage which forms one of the bases of this prosecution, and a few moments' inspection of those records would have revealed the names of the mortgagor and mortgagee alleged in the indictment to be unknown. The indictment being, for the reasons given, wholly insufficient, and being invalid, also, be-

cause of the unfounded allegations of unknown, etc., it has not been deemed necessary to go into the merits of the case. The judgment will be reversed, and the cause remanded, in order that the lower court may conform its action to this opinion. All concur."

All the testimony of the government, including that of Miles, was available to it from July 30th, 1946, the date of the alleged offense to the time of trial. It was not, however, available to appellant and was not stated in the indictment so as to enable appellant to prepare his defense against that evidence. Not until late in the trial of the case, was appellant apprised of the true nature of the hidden evidence against him. Had it been presented to the Grand Jury and been set forth in the indictment he would have had an opportunity to prepare to meet it.

CONCLUSION.

In summarizing, appellant submits:

I.

That the trial court's instructions were erroneous in the following respects:

(a) That in giving Instruction 4D the court assumed facts which should have been submitted to the jury for decision and removed the issue of self-defense from the jury's consideration;

(b) That in giving Instruction 4, the court prejudiced the rights of appellant by commenting on punishment; and

(c) The court failed to give a proper instruction on self-defense which was a material issue in the case, and thus failed to present appellant's theory of defense to the jury.

II.

Prejudicial error was committed in allowing photographs of the injured man's head to be introduced in evidence, exhibited to the jury and subsequently withdrawn from evidence.

III.

The indictment was fatally defective in the following respects:

(a) It did not sufficiently inform appellant of the nature and cause of the accusation within the meaning of the Sixth Amendment;

(b) The alleged "dangerous weapon" was not sufficiently described in the indictment; and

(c) The exact nature of the alleged "dangerous weapon" was known to the United States Attorney, and it could have been easily ascertained by the Grand Jury at the time the indictment was returned. By alleging that the description of the alleged dangerous weapon was "to the Grand Jury unknown", the indictment was rendered defective and appellant was

deprived of the opportunity to prepare his defense to this allegation.

For the foregoing reasons, we believe that the judgment of conviction should be reversed.

Dated, San Francisco, California,
February 16, 1948.

Respectfully submitted,
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(Appendix Follows.)

Appendix.

Appendix

In the following cases (cited pp. 17, 18, 19, supra), the instructions were held faulty and prejudicial because the trial court, in its charge to the jury, wrongfully assumed controverted facts. The cogent portion of each instruction and opinion are set out.

Peo. v. Parish, supra.

Offense involved: Defendant was convicted of practicing a system and mode of treating the sick and afflicted without a valid, unrevoked certificate from the state board of medical examiners.

Instruction (pp. 303-304):

"You are instructed to disregard any statement or suggestions of counsel that chiropractors, or the practitioners of any other system of healing the sick, cannot procure a license to practice their system of healing in this state. And you are further instructed that it is no defense in this case for the defendant to argue or attempt to argue to you that the board of medical examiners of this state has discriminated against him. And in this connection you are instructed that the law of the state, besides other forms of license, provides for the issuance of a certificate which entitles the holder thereof to practice the chiropractic system of healing the sick. All that is required of the applicant for such a license is that he present to said board proof that he is possessed of the education required by law.

If the practitioner of any system or mode of the healing art, including chiropractic, has been by

the board of medical examiners of this state denied any right, he has his proper and adequate remedy therefor in another forum, and the jury in this case may not pass upon the same."

Opinion (pp. 304-305):

"There is nothing in the record to show that defendant had ever attempted to secure a license to practice chiropractic or any other system of healing or that his counsel had ever attempted to suggest that such a license could not be procured, or that the board of medical examiners had ever discriminated against him. * * * The only issue presented by the defendant's evidence was the defense that he had not been guilty of practicing any system or mode of healing requiring him to have secured a certificate. A fair interpretation of this instruction requires the construction that it assumed that the defendant had tried to convince the jury that he had attempted to secure a license to heal the sick. It is apparent that the jury may have considered it their duty to assume this to have been the fact and that they may well have regarded that circumstance as material and determinative of the issue as to whether or not the defendant actually did practice a system of treating the sick and afflicted. The instruction also assumes that the defendant had claimed discrimination against him by the board of medical examiners. Being aware that there was not evidence to support such a charge, the jury might easily be prejudiced against him because of having made so false and base a calumny. This would, of course, prevent that fair consideration of the evidence upon the material issues to which every defendant is entitled. It is unnecessary to

point out in greater detail the prejudicial character of this erroneous instruction."

Dilburn v. State, supra.

Offense involved: homicide.

Instruction:

"He (the defendant) would not be justified in using a deadly weapon if struck by the fist, or any other assault which would not likely cause serious bodily harm."

Opinion:

"This was in effect charging the jury that under the evidence the defendant was not justified in using a deadly weapon and *that the blow struck by the fists was not likely to cause serious bodily harm,* which was the very question then being submitted to the jury." (Italics ours.)

McAndrews v. People, supra.

Offense involved: murder.

Instruction:

"The court charges you that, if you believe from the evidence beyond a reasonable doubt that the defendant assaulted and unlawfully struck the said W. G. Keim upon a vital part of his body with great force and violence, and that such striking was, on account of the extreme age and debility of said W. G. Keim, and on account of its force, violence, and aim, an act which in its consequences would naturally and probably destroy the life of said W. G. Keim, and did in fact occasion his death, then you may infer that the defendant was actuated by malice in committing such act, without further proofs, for malice may

be implied when a person without any considerable provocation does an act naturally tending to destroy life. * * *"

Opinion:

"The objection is that the instruction assumes matters not in evidence. The testimony showed that the deceased had always been well, never had serious sickness. His son said he was 58 years old. He weighed 200 to 210 pounds. The reference, then, to his extreme age and debilitated condition is wholly without evidence to support it. Indeed, it is directly contrary to the facts as shown in evidence.

That jurors give great weight to every remark by a trial judge is common knowledge, and it has frequently been commented upon in reported decisions. When, then, this instruction was given, it was almost certain to produce in the minds of the jurors an impression that the court regarded the evidence as showing extreme age and debility on the part of the deceased. A juror would naturally conclude that he had overlooked some testimony and would accept the court's statement, as in accord with the facts * * *."

Bates v. State, supra.

Offense involved: Breaking and entering with intent to commit a felony.

Instruction:

"Certain parts of the confession have been allowed to go into the evidence. I charge you that in weighing the evidence you must take a confession with care and weigh it very carefully in your consideration of the testimony."

Opinion:

"Every admission or confession said to have been made by the defendant was denied by him, and it was a material fact for the jury to determine whether or not there had been a confession or an admission of facts or circumstances pointing to his guilt. In the instruction complained of the court assumed that this material fact had been proven. The rule laid down by this court is that 'A charge that a material fact to have been proven, when there is conflict in the proof as to such fact, is erroneous.' "

Moore v. State, supra.

Offense involved: Riot.

Instruction:

"Now, gentlemen, you take this case. You are not empaneled here to try whether the Ku Klux Klan is a good order or whether it ain't. You are here to try this man for an offense of riot committed by himself and one other or others."

Opinion:

"* * * it is error for the court to assume, or seem to assume, that the defendant participated in the riot."

Vincent v. State, supra.

Offense involved: murder.

Instruction:

"If you find that the deceased had threatened the life of the defendant, and had a pistol for the purpose of killing him, that would not justify the defendant in going to the deceased's place of busi-

ness with the intent to kill him, and, in pursuance of such intent, taking his life."

Opinon:

"The language, 'That would not justify the defendant in going to the deceased's place of business with the intent to kill him, and in pursuance of such intent, taking his life,' does amount to an expression or intimation of opinion by the court that the defendant went to the deceased's place of business with the intent to kill him, and in pursuance of such intent did take his life. As this instruction did assume as true these facts, it would for that reason be objectionable, and requires the grant of a new trial. * * *"

Peo. v. Kallista, supra.

Offense: simple assault.

Instruction:

"* * * and if the pointing of a gun towards the person of George Jockisch was deliberately done, and was likely to be attended with dangerous circumstances, * * *."

Opinion:

"The instruction assumes the pointing of a gun towards the person of George Jockisch. * * *"

Gray v. Richardson, supra.

Offense: Action for damages for personal injuries.

Instruction:

"The care and caution required of the plaintiff was such conduct and care and caution for her own personal safety in alighting from the car in

question as a reasonably prudent and cautious person would have exercised under the same conditions and circumstances, before and at the time of the alleged injury. * * *''

Opinion:

"As we have pointed out plaintiff alleged and offered evidence to show that she was injured while alighting. The defendants' answer averred and the evidence in their behalf was offered to prove that the injury occurred after she had alighted. Thus the point is controverted in the pleadings and the evidence thereon is in conflict. The instruction, therefore, in assuming that she was alighting from the car was highly prejudicial and our courts have held under similar circumstances that the giving of such an instruction constituted reversible error."

Peo. v. Celmars, supra.

Offense: Rape.

Instruction:

"The court instructs the jury if you believe from the evidence in this case that the defendant made an unlawful assault upon the complaining witness in manner and form as set forth in the indictment you have the right to take into consideration all of the facts and circumstances appearing in the evidence, and you also have the right to take into consideration the superior strength of the defendant at the time of the assault, if any is proven, and the suddenness of the attack, the manner in which the attack was made, if the attack was made in the daytime or the night time, the surroundings and place where the alleged at-

tack was made, and any and all other surrounding facts and circumstances appearing from the evidence."

Opinion:

"By this instruction the superior strength of the plaintiff in error and the suddenness of the attack were assumed as facts. These assumptions necessarily involved the precedent assumption that plaintiff in error had committed the assault. It is not the province of the court, in an instruction to the jury, to assume the truth of any controverted fact."

Peo. v. Harvey, supra.

Offense involved: manslaughter.

Instruction:

"The court instructs the jury, as a matter of law, that if one who is in an enfeebled physical condition is unlawfully assaulted and an injury is inflicted upon her which is mortal to her in her enfeebled condition, then, even though such injury would not have been mortal to a woman in good health, still the assailant is deemed in law to be guilty of murder or manslaughter, as the case may be."

Opinion:

"It is argued that this states a mere abstract principle of law not specifically applied to the facts in this case; that it invades the province of the jury, because it assumes controverted facts: First, an assault; second, that the injury was inflicted thereby; and, third, that the injury was mortal. Beyond question the instruction is faulty in assuming these controverted facts."

Barber v. State, supra.

Offense involved: Unlawful possession of intoxicating liquors.

Instruction:

"* * * that, if you believe from the evidence in this cause, that the defendant knowingly had in her possession or under her control intoxicating liquors as testified to by the witness Bonner, then she is guilty as charged, and it is your sworn duty to so find."

Opinion:

"This instruction assumes and in effect charged the jury that Bonner had testified that the whiskey found by him in the appellant's house was there with her knowledge and was in her possession or under her control, when he had not in fact so testified. His testimony, as hereinbefore stated, was simply that the whiskey was found in the appellant's house. Whether she knew the whiskey was there and whether it was in her possession and under her control were facts to be found by the jury from all the evidence in the case. The instruction should not have been given."

State v. Mazur, supra.

Offense involved: common assault.

Instruction:

"* * * if you believe from the evidence that at the time the defendants maimed or disfigured the prosecuting witness by assaulting prosecuting witness they had good reason to believe that the prosecuting witness was about to do them some great bodily harm, then in that case the defend-

ants would be justified under the law of self-defense, and you should acquit them; * * *"

Opinion:

"But few comments are needed to point out fatal error. Felonious assault and not mayhem is the issue, and 'maimed or disfigured' is assumed."

State v. Johnson, supra.

Offense involved: Having carnal knowledge of a female * * * of age of 17.

Instruction:

"The court instructs the jury that if you find * * * the defendant did feloniously assault and carnally know the witness, May White, at the time the assault was charged to have been made, was over the age of 15 years and under the age of 18 years, and that said May White was, at that time, an unmarried female of previously chaste character, and that the defendant was, at the time, over the age of 17 years, you will find the defendant guilty."

Opinion:

"The instruction is unfortunately expressed. If the words 'and if they further find' had been inserted after the words 'May White' where the name of the prosecutrix first appears, so as to read, 'and if they further find that at the time the assault was charged to have been made,' etc., it could not be said that the instruction assumed that May White, 'at the time the assault was charged to have been made, was over the age of 15 years and under the age of 18 years, and that the said May White was, at the time, an unmar-

ried female of previously chaste character.' But as it is written it makes these assumptions. Instructions should never assume controverted facts (citing case). They should be so explicitly adapted to the case that the jury cannot fail to understand the law as applicable to the evidence. When the court undertakes to instruct on a question of law for the guidance of the jury the instruction should guide them fairly." (Citing case.)

State v. Harrington, supra.

Offense involved: Selling intoxicating liquors.

Instruction:

"* * * that the state has elected to stand upon the evidence of the sale by the defendant of one pint of whisky about 8 o'clock of the evening of that day, when the witnesses Ryan and Van Wert were present."

Opinion: In holding that the instruction assumes the fact that Ryan and Van Wert were present and witnessed the sale, the court said:

"This was a comment upon the evidence, and an invasion of the province of the jury in its endeavor to ascertain the facts. That a court may not do this without depriving the accused of his absolute right to have the question of his guilt or innocence, not only of the particular crime charged, but every material incident included in it, passed upon by the jury, is settled by the decision of this court in State v. Koch, 33 Mont. 501, 85 Pac. 272, 8 Ann. Cas. 804, and kindred cases."

Colby v. State, supra.

Offense involved: Receiving stolen property.

Instruction:

"You are further instructed that if you find and believe from the evidence in this case beyond a reasonable doubt that at the time said clock was purchased by the said defendant that he knew that said clock had been stolen, * * *"

Opinion:

"The underlying vice in the foregoing instruction is in the assumption that the defendant purchased and received from the self-confessed thief the property in question. It clearly invades the province of the jury in that it assumes the testimony of the witness Baker to be true. * * *

The trial court is never warranted in giving an instruction which has the effect of determining controverted questions of fact. (Citing case.)

The law requires the court, not only to abstain from positive expression as to the weight of the evidence, but to avoid even the appearance of an intimation as to the facts, and to so guard the language of its charge to the jury, which is the law of the case, that no inference, however remote or obscure, may be drawn by the jury as to the weight of the evidence."

Walls v. State, supra.

Offense involved: Selling intoxicating liquor.

Instruction:

"You are instructed that it is no less an offense to sell intoxicating liquor for any purpose to a sheriff or prosecuting attorney, or to an agent, detective, or representative of either than it is to sell to any one else; and a sale made to such officer or agent or detective, though solicited by him

for the purpose of detecting the commission of the offense and of instituting prosecution therefor, is punishable the same as if the sale had been made to any other person and for other purposes."

Opinion:

"These instructions assume the sale of whisky. This was a controverted question, and the assumption by the court that the sale was made is prejudicial."

Hughes v. State, supra.

Offense involved: Unlawful transportation of intoxicating liquor.

Instruction:

"* * * Now, if you believe * * * that the whiskey found by the officer in the defendant's car was brought to the place * * *".

Opinion:

Instruction assumes defendant had whiskey in his car and that the liquid found was whiskey.

Redwine v. State, supra.

Offense involved: Murder.

Instruction:

"You are further charged that if you believe from the evidence that the defendant, Jewel Redwine, provoked the difficulty for the purpose of killing the deceased * * *

You are further charged that if you believe from the evidence that the defendant, Jewel Redwine, provoked the difficulty only for the purpose of whipping Eulon Ellis, * * *"

Opinion:

"The criticism is that this charge assumed the fact that appellant did provoke the difficulty, and that if he did it for the purpose of killing deceased, and under certain circumstances it would be murder, and under other circumstances it would have been manslaughter. The court is not authorized to assume any fact that is detrimental to the rights of the accused. If the issue of provoking the difficulty is in the case, the court must instruct the jury to first find that fact, * * *."

Webb v. Snow, supra.

Offense involved: Action to recover damages for alleged assault and battery.

Instruction:

"The court instructs you that if you believe from the evidence that the plaintiff was pregnant at the time she was *rendered unconscious* by the blow delivered by one of the defendants' employes, and as a result of said blow and being knocked to the floor she suffered a miscarriage and thereby the loss of her unborn child, you may award her money damages for the *loss of said unborn child.*" (Italics ours.)

Opinion:

"The foregoing instruction disregarded entirely the fact that there was considerable dispute and conflict in the evidence. The instruction, standing alone, would amount to an instruction to find in favor of the plaintiff if the jury found that plaintiff was pregnant at the time she was struck, and if they also found that a miscarriage resulted. The instruction assumes that defendants' employees were to blame for what occurred, and that

the evidence was uncontradicted as to the following: (1) That plaintiff was 'rendered unconscious' by the 'blow,' and (2) that she was knocked to the floor. The instruction is so worded that it indicated to the jury a belief on the part of the court that defendants' employees were blameworthy, irrespective of the acts of plaintiff. As stated in State v. Seymour, 49 Utah 285, 163 P. 789, 792: 'Courts, in charging jurors, should be very careful not to assume any material fact or facts. Jurors, who are laymen, are always eager to follow the opinion or judgment of the court, and if the court assumes any material fact in the charge, the jurors are most likely to follow the assumptions of the court. Indeed, we must assume that such is the case unless the record clearly shows the contrary.' ''

State v. Hanna, supra.

Offense involved: Carnal knowledge of a female under age of consent.

This requested instruction was correctly refused:

"And you are instructed in this connection, that if the evidence offered and received in this case raises in your minds a reasonable doubt as to the presence of the defendant at the place *where the offense was committed, at the time of the commission thereof,* then your verdict should be for the defendant, not guilty." (Italics ours.)

Opinion:

"That it is error for the court in instructing the jury to assume as proven any material controverted fact is held by this court in State v. Seymour, 49 Utah 285, 163 P. 789, 792 * * * So thoroughly established is this principle that it seems

almost superfluous to cite authorities. When the instruction without qualification assumed that the offense had been committed, it thereby relieved the jury of the necessity of weighing the evidence and determining for itself that question. It was the province of the jury to determine whether the offense had been committed, and not for the court to assume it as a proven fact."

Peo. v. Haack, supra.

The instructions declared in effect that recent possession of stolen property, unless satisfactorily explained, is a circumstance tending to show the guilt of the defendant.

Held: This instruction was erroneous and prejudicial as assuming recent possession of stolen property on the part of the defendant.

Peo. v. Woodcock, supra.

The court here noted that the instruction was unduly favorable to the prosecution's theory and carried the intimation on the part of the trial court that the facts supporting the prosecution's theory did in fact exist, and that the inferences which the law permits the jury to draw from the testimony were drawn by the court itself and embodied in the instruction in such a way that the jury must necessarily have assumed that the theory was a fact proved.

Peo. v. Williams, supra.

In this case an instruction contained the word "victim" and the court held it prejudicial because it seemed to assume that the deceased was wrongfully killed and was calculated to prejudice the accused.